

Section 152, acts Feb. 19, 1948, ch. 65, §3, 62 Stat. 22; Aug. 9, 1955, ch. 628, §15, 69 Stat. 551, related to advertisements for bids, opening of bids and award or rejection of bids. See section 2305 of Title 10. Act Aug. 9, 1955, ch. 628, §15, 69 Stat. 551, which amended section 152 of this title, was repealed by Pub. L. 85-861, §36A, Sept. 2, 1958, 72 Stat. 1569.

Section 153, acts Feb. 19, 1948, ch. 65, §4, 62 Stat. 23; Oct. 31, 1951, ch. 652, 65 Stat. 700, provided for types of contracts and examination of books, records, etc., of contractors. See sections 2306 and 2313 of Title 10.

Section 154, act Feb. 19, 1948, ch. 65, §5, 62 Stat. 24, authorized advance payments under negotiated contracts. See section 2307 of Title 10.

Section 155, act Feb. 19, 1948, ch. 65, §6, 62 Stat. 24, provided for remission of liquidated damages. See section 2312 of Title 10.

Section 156, act Feb. 19, 1948, ch. 65, §7, 62 Stat. 24, provided for determinations and decisions, powers of agency head, finality of decisions, delegations of powers, non-delegable powers, written decisions, preservation of data. See sections 2304, 2310, and 2311 of Title 10.

Section 157, act Feb. 19, 1948, ch. 65, §8, 62 Stat. 24, related to exemption of purchases or contracts from certain other provisions of law. See section 2304 of Title 10.

Section 158, act Feb. 19, 1948, ch. 65, §9, 62 Stat. 24, defined "agency head" and "supplies". See sections 2302 and 2303 of Title 10.

Section 159, act Feb. 19, 1948, ch. 65, §10, 62 Stat. 25, related to assignment and delegation of joint procurement responsibilities by agency head, and allocation of appropriations. See sections 2308 and 2309 of Title 10.

Section 160, act Feb. 19, 1948, ch. 65, §11(b), 62 Stat. 25, provided that sections 5, 6, 6a, and 13 of this title should be inapplicable to procurement of supplies and services. See section 2314 of Title 10.

Section 161, act Feb. 19, 1948, ch. 65, §12, 62 Stat. 26, related to concurrent authority of Secretaries of Army, Navy and Air Force. See section 2381 of Title 10.

Section 162, act July 10, 1952, ch. 630, title VI, §638, 66 Stat. 537, related to obligation of funds by Department of Defense for procurement and distribution of supplies or equipment. See section 2202 of Title 10.

## CHAPTER 4—PROCUREMENT PROCEDURES

### SUBCHAPTER I—GENERAL PROVISIONS

Sec.

201 to 205. Transferred.

### SUBCHAPTER II—GENERAL SERVICES ADMINISTRATION

211 to 219. Transferred.

### SUBCHAPTER III—PROPERTY MANAGEMENT

231 to 240. Transferred.

### SUBCHAPTER IV—PROCUREMENT PROVISIONS

251. Declaration of purpose of this subchapter.

252. Purchases and contracts for property.  
 (a) Applicability of subchapter; delegation of authority.  
 (b) Small business concerns; share of business.  
 (c) Authorization of erection, repair, or furnishing of public buildings or improvements; contracts for construction or repair of buildings, roads, sidewalks, sewers, mains, etc.; Federal Highway Lands Program.

252a. Simplified acquisition threshold.  
 (a) Simplified acquisition threshold.

252b. Implementation of simplified acquisition procedures.

252c. Implementation of electronic commerce capability.  
 (a) Implementation of electronic commerce capability.  
 (b) Designation of agency official.

Sec.  
253.

Competition requirements.

- (a) Procurement through full and open competition; competitive procedures.
- (b) Exclusion of particular source; restriction of solicitation to small business concerns.
- (c) Use of noncompetitive procedures.
- (d) Property or services deemed available from only one source; nondelegable authority.
- (e) Offer requests to potential sources.
- (f) Justification for use of noncompetitive procedures.
- (g) Simplified procedures for small purchases.
- (h) Efficient implementation of requirement.

253a.

Planning and solicitation requirements.

- (a) Preparation; planning; specifications in solicitation.
- (b) Contents of solicitation.
- (c) Evaluation factors.
- (d) Additional information in solicitation.

253b.

Evaluation and award.

- (a) Basis.
- (b) Rejection of bids or proposals.
- (c) Opening of bids; promptness of award; written notice.
- (d) Discussions with offerors; written notification.
- (e) Post-award debriefings.
- (f) Preaward debriefings.
- (g) Summary of debriefing.
- (h) Alternative dispute resolution.
- (i) Antitrust violations.
- (j) Planning for future competition.
- (k) Protest file.
- (l) Agency actions on protests.
- (m) Prohibition on release of contractor proposals.

253c.

Encouragement of new competition.

- (a) "Qualification requirement" defined.
- (b) Agency head; functions; prior to enforcement of qualification requirement.
- (c) Applicability; waiver authority; referral of offers.
- (d) Number; qualified sources or products; fewer than two actual manufacturers; functions of agency head.
- (e) Examination; need for qualification requirement.
- (f) Enforcement determination by agency head.

253d.

Validation of proprietary data restrictions.

- (a) Contracts; delivery of technical services; contents.
- (b) Review; challenge; notice.
- (c) Written request; additional time; schedule of responses.
- (d) Decision; validity of asserted restriction; failure to submit response.
- (e) Claim; considered claim within Contract Disputes Act of 1978.
- (f) Challenge; use of technical data; sustained; liability of United States for costs and fees.

253e.

Repealed.

253f.

Economic order qualities.

- (a) Procurement of supplies; costs advantageous to United States.
- (b) Opinions; economic advantage to United States.

253g.

Prohibition of contractors limiting subcontractor sales directly to United States.

Sec.		Sec.	
	(a) Contract restrictions.		(h) Definitions.
	(b) Rights under law.	254c.	Multiyear contracts.
	(c) Inapplicability to certain contracts.		(a) Authority.
	(d) Inapplicability when Government treated similarly to other purchasers.		(b) Termination clause.
253h.	Task and delivery order contracts: general authority.		(c) Cancellation ceiling notice.
	(a) Authority to award.	254d.	(d) Multiyear contract defined.
	(b) Solicitation.		(e) Rule of construction.
	(c) Applicability of restriction on use of noncompetitive procedures.		Examination of records of contractor.
	(d) Single and multiple contract awards.		(a) Agency authority.
	(e) Contract modifications.		(b) Subpoena power.
	(f) Inapplicability to contracts for advisory and assistance services.		(c) Comptroller General authority.
	(g) Relationship to other contracting authority.		(d) Limitation on audits relating to indirect costs.
253i.	Task order contracts: advisory and assistance services.		(e) Limitation.
	(a) Authority to award.	255.	(f) Inapplicability to certain contracts.
	(b) Limitation on contract period.		(g) Form of original record storage.
	(c) Content of notice.		(h) Use of images of original records.
	(d) Required content of solicitation and contract.		(i) "Records" defined.
	(e) Multiple awards.		Contract financing.
	(f) Contract modifications.		(a) Payment authority.
	(g) Contract extensions.		(b) Performance-based payments.
	(h) Inapplicability to certain contracts.		(c) Payment amount.
	(i) "Advisory and assistance services" defined.	256.	(d) Security for advance payments.
253j.	Task and delivery order contracts: orders.		(e) Conditions for progress payments.
	(a) Issuance of orders.		(f) Conditions for payments for commercial items.
	(b) Multiple award contracts.		(g) Action in case of fraud.
	(c) Statement of work.		Allowable costs.
	(d) Protests.		(a) Indirect cost that violates FAR cost principle.
	(e) Task and delivery order ombudsman.		(b) Penalty for violation of cost principle.
	(f) Applicability.		(c) Waiver of penalty.
253k.	Task and delivery order contracts: definitions.		(d) Applicability of contract disputes procedure to disallowance of cost and assessment of penalty.
253l.	Severable services contracts for periods crossing fiscal years.		(e) Specific costs not allowable.
	(a) Authority.		(f) Required regulations.
	(b) Obligation of funds.		(g) Applicability of regulations to subcontractors.
253l-1.	Contract authority of Comptroller General.		(h) Contractor certification required.
253l-2.	Contract authority of Library of Congress.		(i) Penalties for submission of cost known as not allowable.
253l-3.	Contract authority of Chief Administrative Officer of the House of Representatives.		(j) Contractor to have burden of proof.
253l-4.	Contract authority of Congressional Budget Office.		(k) Proceeding costs not allowable.
253m.	Design-build selection procedures.		(l) "Covered contract" defined.
	(a) Authorization.	256a.	(m) Other definitions.
	(b) Criteria for use.	257.	Waiver of liquidated damages.
	(c) Procedures described.		Administrative determinations.
	(d) Solicitation to state number of offerors to be selected for phase-two requests for competitive proposals.		(a) Conclusiveness; delegation of powers.
	(e) Requirement for guidance and regulations.		(b) Basis of determinations; finding conclusive; preservation of findings; copy.
254.	Contract requirements.	258.	Repealed.
	(a) Contracts awarded using procedures other than sealed-bid procedures.	259.	Definitions.
	(b) Barred contracts; fee limitation; determination of use; advance notification.	260.	Laws not applicable to contracts.
254a.	Cost-type research and development contracts with educational institutions.	261.	Assignment and delegation of procurement functions and responsibilities.
254b.	Cost or pricing data: truth in negotiations.		(a) In general.
	(a) Required cost or pricing data and certification.		(b) Procurements for or with other agencies.
	(b) Exceptions.	262.	Determinations and decisions.
	(c) Cost or pricing data on below-threshold contracts.		(a) Individual or class determinations and decisions authorized.
	(d) Submission of other information.		(b) Written findings required.
	(e) Price reductions for defective cost or pricing data.	263.	Performance based management: acquisition programs.
	(f) Interest and penalties for certain overpayments.		(a) Congressional policy.
	(g) Right of United States to examine contractor records.		(b) Establishment of goals.
			(c) Identification of noncompliant programs.
		264.	Relationship of commercial item provisions to other provisions of law.
			(a) Applicability of subchapter.
			(b) List of laws inapplicable to contracts for acquisition of commercial items.
		264a.	Definitions relating to procurement of commercial items.

- Sec.  
264b. Preference for acquisition of commercial items.  
    (a) Preference.  
    (b) Implementation.  
    (c) Preliminary market research.
265. Contractor employees: protection from reprisal for disclosure of certain information.  
    (a) Prohibition of reprisals.  
    (b) Investigation of complaints.  
    (c) Remedy and enforcement authority.  
    (d) Construction.  
    (e) Definitions.
266. Merit-based award of grants for research and development.  
    (a) Policy.  
    (b) Rule of construction.  
    (c) New grant defined.  
    (d) Inapplicability to certain grants.

SUBCHAPTER V—FOREIGN EXCESS PROPERTY

271 to 274. Transferred.

SUBCHAPTER VI—FEDERAL RECORD MANAGEMENT

281 to 291. Transferred.

SUBCHAPTER I—GENERAL PROVISIONS

§§ 201 to 205. Transferred

CODIFICATION

Section 201, act June 30, 1949, ch. 288, § 2, 63 Stat. 378, which related to Congressional declaration of policy, was transferred to section 471 of Title 40, Public Buildings, Property, and Works.

Section 202, acts June 30, 1949, ch. 288, § 3, 63 Stat. 378; Sept. 5, 1950, ch. 849, §§ 7(a), 8(a), 64 Stat. 590, which related to definitions, was transferred to section 472 of Title 40.

Section 203, act June 30, 1949, ch. 288, title VI, § 601, formerly title V, § 501, 63 Stat. 399; renumbered Sept. 5, 1950, ch. 849, § 6(a), (b), 64 Stat. 583, which related to applicability of existing provisions, was transferred to section 473 of Title 40.

Section 204, act June 30, 1949, ch. 288, title VI, § 602(c), (d), formerly title V, § 502(c), (d), 63 Stat. 401; renumbered and amended Sept. 5, 1950, ch. 849, §§ 6(a), (b), 7(e), (f), 8(c), 64 Stat. 583, 590, which related to exemptions for Congress, departments, agencies, corporations, and persons, was transferred to section 474 of Title 40.

Section 205, act June 30, 1949, ch. 288, title VI, § 603, formerly title V, § 503, 63 Stat. 403; renumbered and amended Sept. 5, 1950, ch. 849, §§ 6(a), (b), 7(g), 64 Stat. 583, 590, which related to authorization of appropriations and fund transfer authority, was transferred to section 475 of Title 40.

SUBCHAPTER II—GENERAL SERVICES ADMINISTRATION

§§ 211 to 219. Transferred

CODIFICATION

Section 211, act June 30, 1949, ch. 288, title I, § 101, 63 Stat. 379, which related to General Services Administration, was transferred to section 630 of former Title 5, Executive Departments and Government Officers and Employees, and subsequently transferred to section 751 of Title 40, Public Buildings, Property, and Works.

Section 212, act June 30, 1949, ch. 288, title I, § 102, 63 Stat. 380, which related to transfer of functions, was transferred to section 630a of former Title 5, Executive Departments and Government Officers and Employees, and subsequently transferred to section 752 of Title 40.

Section 213, act June 30, 1949, ch. 288, title I, § 103, 63 Stat. 380, which related to transfer of affairs of Federal Works Agency, was transferred to section 630b of former Title 5, Executive Departments and Govern-

ment Officers and Employees, and subsequently transferred to section 753 of Title 40.

Section 214, act June 30, 1949, ch. 288, title I, § 104, 63 Stat. 381, which related to records management, was transferred to section 391 of former Title 44, Public Printing and Documents. See sections 1506, 2102, 2301, 2501, and 2902 of Title 44, Public Printing and Documents.

Section 215, act June 30, 1949, ch. 288, title I, § 105, 63 Stat. 381, which related to transfer and liquidation of War Assets Administration, was transferred to section 630c of former Title 5, Executive Departments and Government Officers and Employees, and was subsequently repealed by section 8(a) of Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 632.

Section 216, act June 30, 1949, ch. 288, title I, § 106, 63 Stat. 381, which related to redistribution of Administrator's functions, was transferred to section 630d of former Title 5, Executive Departments and Government Officers and Employees, and subsequently transferred to section 754 of Title 40, Public Buildings, Property, and Works.

Section 217, act June 30, 1949, ch. 288, title I, § 107, 63 Stat. 382, which related to transfer of funds, was transferred to section 630e of former Title 5, Executive Departments and Government Officers and Employees, and subsequently transferred to section 755 of Title 40.

Section 218, act June 30, 1949, ch. 288, title I, § 108, 63 Stat. 382, which related to status of transferred employees, was transferred to section 630f of former Title 5, Executive Departments and Government Officers and Employees, and was subsequently repealed by section 8(a) of Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 632.

Section 219, acts June 30, 1949, ch. 288, title I, § 109, 63 Stat. 382; Sept. 5, 1950, ch. 849, §§ 1, 2(a), (b), 3, 64 Stat. 578, which related to the General Supply Fund, was transferred to section 630g of former Title 5, Executive Departments and Government Officers and Employees, and subsequently transferred to section 756 of Title 40, Public Buildings, Property, and Works.

SUBCHAPTER III—PROPERTY MANAGEMENT

§§ 231 to 240. Transferred

CODIFICATION

Section 231, acts June 30, 1949, ch. 288, title II, § 201, 63 Stat. 383; Aug. 10, 1949, ch. 412, § 12(a), 63 Stat. 591; Sept. 5, 1950, ch. 849, § 8(b), 64 Stat. 591, which related to procurement, warehousing, and related activities, was transferred to section 481 of Title 40, Public Building, Property, and Works.

Section 231a, act Oct. 26, 1949, ch. 737, 63 Stat. 920, which related to clarification of status of Architect of the Capitol under this chapter, was transferred to section 482 of Title 40.

Section 232, acts June 30, 1949, ch. 288, title II, § 202, 63 Stat. 384; Aug. 10, 1949, ch. 412, § 12(a), 63 Stat. 591, which related to property utilization, was transferred to section 483 of Title 40.

Section 233, acts June 30, 1949, ch. 288, title II, § 203, 63 Stat. 385; Aug. 10, 1949, ch. 412, § 12(a), 63 Stat. 591; Sept. 5, 1950, ch. 849, § 4, 64 Stat. 579, which related to disposal or surplus property, was transferred to section 484 of Title 40.

Section 234, act June 30, 1949, ch. 288, title I, § 204, 63 Stat. 388, which related to proceeds from transfer, sale, etc., of property, was transferred to section 485 of Title 40.

Section 235, acts June 30, 1949, ch. 288, title II, § 205, 63 Stat. 389; Sept. 5, 1950, ch. 849, § 9, 64 Stat. 591, which related to policies, regulations, and delegations, was transferred to section 486 of Title 40.

Section 236, acts June 30, 1949, ch. 288, title II, § 206, 63 Stat. 390; Aug. 10, 1949, ch. 412, § 12(a), 63 Stat. 591, which related to surveys of government property and property management practices, was transferred to section 487 of Title 40.

Section 237, act June 30, 1949, ch. 288, title II, §207, 63 Stat. 391, which related to applicability of antitrust laws to property disposal, was transferred to section 488 of Title 40.

Section 238, acts June 30, 1949, ch. 288, title II, §208, 63 Stat. 391; Sept. 5, 1950, ch. 849, §7(b), (c), 64 Stat. 590, which related to appointment and compensation of personnel, was transferred to section 630h of former Title 5, Executive Departments and Government Officers and Employees, and was subsequently transferred to section 758 of Title 40.

Section 239, act June 30, 1949, ch. 288, title II, §209, 63 Stat. 392, which related to civil remedies and penalties, was transferred to section 489 of Title 40.

Section 239a, act June 30, 1949, ch. 288, title II, §210, as added Sept. 5, 1950, ch. 849, §5(c), 64 Stat. 580, which related to operation of buildings and related activities by the Administrator, was transferred to section 490 of Title 40.

Section 239b, act June 30, 1949, ch. 288, title II, §211, as added Sept. 5, 1950, ch. 849, §5(c), 64 Stat. 580, which related to motor vehicle identification, was transferred to section 491 of Title 40.

Section 240, act June 30, 1949, ch. 288, title II, §212, formerly §210, 63 Stat. 393; renumbered Sept. 5, 1950, ch. 849, §5(a), 64 Stat. 580, which related to reports to Congress, was transferred to section 492 of Title 40.

## SUBCHAPTER IV—PROCUREMENT PROVISIONS

### SUBCHAPTER REFERRED TO IN OTHER SECTIONS

This subchapter is referred to in sections 405, 414a, 418a, 421 of this title; title 5 section 595; title 7 section 1736a; title 15 sections 205f, 205l, 637; title 16 sections 670o, 793; title 22 section 277d-44; title 25 section 450j; title 28 section 524; title 31 sections 3718, 9703; title 38 section 3720; title 40 sections 356a, 474, 602a, 604, 752, 758; title 42 sections 1592d, 12651, 13556; title 43 section 1736; title 44 section 311.

### § 251. Declaration of purpose of this subchapter

The purpose of this subchapter is to facilitate the procurement of property and services.

(June 30, 1949, ch. 288, title III, §301, 63 Stat. 393; July 12, 1952, ch. 703, §1(m), 66 Stat. 594.)

### AMENDMENTS

1952—Act July 12, 1952, substituted “property” for “supplies”.

### EFFECTIVE DATE OF 1996 AMENDMENT

Pub. L. 104-106, div. D, title XLIV, §4401, Feb. 10, 1996, 110 Stat. 678, provided that:

“(a) EFFECTIVE DATE.—Except as otherwise provided in this division [div. D (§§4001-4402) of Pub. L. 104-106, see Short Title of 1996 Amendment note below], this division and the amendments made by this division shall take effect on the date of the enactment of this Act [Feb. 10, 1996].

“(b) APPLICABILITY OF AMENDMENTS.—

“(1) SOLICITATIONS, UNSOLICITED PROPOSALS, AND RELATED CONTRACTS.—An amendment made by this division shall apply, in the manner prescribed in the final regulations promulgated pursuant to section 4402 [set out below] to implement such amendment, with respect to any solicitation that is issued, any unsolicited proposal that is received, and any contract entered into pursuant to such a solicitation or proposal, on or after the date described in paragraph (3).

“(2) OTHER MATTERS.—An amendment made by this division shall also apply, to the extent and in the manner prescribed in the final regulations promulgated pursuant to section 4402 to implement such amendment, with respect to any matter related to—

“(A) a contract that is in effect on the date described in paragraph (3);

“(B) an offer under consideration on the date described in paragraph (3); or

“(C) any other proceeding or action that is ongoing on the date described in paragraph (3).

“(3) DEMARCATION DATE.—The date referred to in paragraphs (1) and (2) is the date specified in such final regulations. The date so specified shall be January 1, 1997, or any earlier date that is not within 30 days after the date on which such final regulations are published.”

### EFFECTIVE DATE OF 1994 AMENDMENT

Pub. L. 103-355, title X, §10001, Oct. 13, 1994, 108 Stat. 3404, provided that:

“(a) EFFECTIVE DATE.—Except as otherwise provided in this Act, this Act [see Short Title of 1994 Amendment note below] and the amendments made by this Act shall take effect on the date of the enactment of this Act [Oct. 13, 1994].

“(b) APPLICABILITY OF AMENDMENTS.—(1) An amendment made by this Act shall apply, in the manner prescribed in the final regulations promulgated pursuant to section 10002 to implement such amendment [set out below], with respect to any solicitation that is issued, any unsolicited proposal that is received, and any contract entered into pursuant to such a solicitation or proposal, on or after the date described in paragraph (3).

“(2) An amendment made by this Act shall also apply, to the extent and in the manner prescribed in the final regulations promulgated pursuant to section 10002 to implement such amendment, with respect to any matter related to—

“(A) a contract that is in effect on the date described in paragraph (3);

“(B) an offer under consideration on the date described in paragraph (3); or

“(C) any other proceeding or action that is ongoing on the date described in paragraph (3).

“(3) The date referred to in paragraphs (1) and (2) is the date specified in such final regulations [Oct. 1, 1995, see 60 F.R. 48231, Sept. 18, 1995]. The date so specified shall be October 1, 1995, or any earlier date that is not within 30 days after the date on which such final regulations are published.

“(c) IMMEDIATE APPLICABILITY OF CERTAIN AMENDMENTS.—Notwithstanding subsection (b), the amendments made by the following provisions of this Act apply on and after the date of the enactment of this Act [Oct. 13, 1994]: sections 1001, 1021, 1031, 1051, 1071, 1092, 1201, 1506(a), 1507, 1554, 2002(a), 2191, 3062(a), 3063, 3064, 3065(a)(1), 3065(b), 3066, 3067, 6001(a), 7101, 7103, 7205, and 7206, the provisions of subtitles A, B, and C of title III [§§3001-3025], and the provisions of title V [see Tables for classification].”

### EFFECTIVE DATE OF 1984 AMENDMENT

Pub. L. 98-369, div. B, title VII, §2751, July 18, 1984, 98 Stat. 1203, provided that:

“(a) Except as provided in subsection (b), the amendments made by this title [see Short Title of 1984 Amendments note below] shall apply with respect to any solicitation for bids or proposals issued after March 31, 1985.

“(b) The amendments made by section 2713 [amending section 759 of Title 40, Public Buildings, Property, and Works, and enacting provisions set out as a note under section 759 of Title 40] and subtitle D [enacting sections 3551 to 3556 of Title 31, Money and Finance] shall apply with respect to any protest filed after January 14, 1985.”

### EFFECTIVE DATE

Section effective July 1, 1949, see section 605 of act June 30, 1949, set out as a note under section 471 of Title 40, Public Buildings, Property, and Works.

### SHORT TITLE OF 1996 AMENDMENT

Pub. L. 104-106, div. D, §4001, Feb. 10, 1996, 110 Stat. 642, as amended by Pub. L. 104-208, div. A, title I, §101(f)

[title VIII, §808(a)], Sept. 30, 1996, 110 Stat. 3009-314, 3009-393, provided that: "This division [div. D (§§4001-4402) of Pub. L. 104-106, see Tables for classification] and division E (§§5001-5703 of Pub. L. 104-106, see Tables for classification) may be cited as the 'Clinger-Cohen Act of 1996'."

#### SHORT TITLE OF 1994 AMENDMENT

Pub. L. 103-355, §1, Oct. 13, 1994, 108 Stat. 3243, provided that: "This Act [see Tables for classification] may be cited as the 'Federal Acquisition Streamlining Act of 1994'."

#### SHORT TITLE OF 1984 AMENDMENTS

Pub. L. 98-577, §1, Oct. 30, 1984, 98 Stat. 3066, provided that this Act [enacting sections 253c to 253h, 414a, 418a, and 418b of this title, repealing section 2303a of Title 10, Armed Forces, amending sections 253, 253b, 259, 403, and 416 of this title, sections 2302, 2304, 2311, and 2320 of Title 10, and sections 637 and 644 of Title 15, Commerce and Trade, and enacting provisions set out as notes under this section, section 416 of this title, and sections 637 and 644 of Title 15] may be cited as the "Small Business and Federal Procurement Competition Enhancement Act of 1984".

Pub. L. 98-369, div. B, title VII, §2701, July 18, 1984, 98 Stat. 1175, provided that: "This title [enacting sections 253a, 253b, 416 to 419 of this title and sections 3551 to 3556 of Title 31, Money and Finance, amending sections 252, 253, 254, 257, 258, 259, 260, 403, 405, and 414 of this title, sections 2301 to 2306, 2310, 2311, 2313, and 2356 of Title 10, Armed Forces, and section 759 of Title 40, Public Buildings, Property, and Works, and enacting provisions set out as notes under this section, sections 253, 403, and 407 of this title, section 2304 of Title 10, and section 759 of Title 40] may be cited as the 'Competition in Contracting Act of 1984'."

#### REGULATIONS

Pub. L. 104-106, div. D, title XLIV, §4402, Feb. 10, 1996, 110 Stat. 678, provided that:

"(a) PROPOSED REVISIONS.—Proposed revisions to the Federal Acquisition Regulation and such other proposed regulations (or revisions to existing regulations) as may be necessary to implement this Act [see Tables for classification] shall be published in the Federal Register not later than 210 days after the date of the enactment of this Act [Feb. 10, 1996].

"(b) PUBLIC COMMENT.—The proposed regulations described in subsection (a) shall be made available for public comment for a period of not less than 60 days.

"(c) FINAL REGULATIONS.—Final regulations shall be published in the Federal Register not later than 330 days after the date of enactment of this Act [Feb. 10, 1996].

"(d) MODIFICATIONS.—Final regulations promulgated pursuant to this section to implement an amendment made by this Act may provide for modification of an existing contract without consideration upon the request of the contractor.

"(e) SAVINGS PROVISIONS.—

"(1) VALIDITY OF PRIOR ACTIONS.—Nothing in this division [div. D (§§4001-4402) of Pub. L. 104-106, see Short Title of 1996 Amendment note above] shall be construed to affect the validity of any action taken or any contract entered into before the date specified in the regulations pursuant to section 4401(b)(3) [set out as an Effective Date of 1996 Amendment note above] except to the extent and in the manner prescribed in such regulations.

"(2) RENEGOTIATION AND MODIFICATION OF PREEXISTING CONTRACTS.—Except as specifically provided in this division, nothing in this division shall be construed to require the renegotiation or modification of contracts in existence on the date of the enactment of this Act [Feb. 10, 1996].

"(3) CONTINUED APPLICABILITY OF PREEXISTING LAW.—Except as otherwise provided in this division, a law amended by this division shall continue to be ap-

plied according to the provisions thereof as such law was in effect on the day before the date of the enactment of this Act until—

"(A) the date specified in final regulations implementing the amendment of that law (as promulgated pursuant to this section); or

"(B) if no such date is specified in regulations, January 1, 1997."

Pub. L. 103-355, title X, §10002, Oct. 13, 1994, 108 Stat. 3404, provided that:

"(a) PROPOSED REVISIONS.—Proposed revisions to the Federal Acquisition Regulation and such other proposed regulations (or revisions to existing regulations) as may be necessary to implement this Act [see Short Title of 1994 Amendment note above] shall be published in the Federal Register not later than 210 days after the date of the enactment of this Act [Oct. 13, 1994].

"(b) PUBLIC COMMENT.—The proposed regulations described in subsection (a) shall be made available for public comment for a period of not less than 60 days.

"(c) FINAL REGULATIONS.—Final regulations shall be published in the Federal Register not later than 330 days after the date of enactment of this Act.

"(d) MODIFICATIONS.—Final regulations promulgated pursuant to this section to implement an amendment made by this Act may provide for modification of an existing contract without consideration upon the request of the contractor.

"(e) REQUIREMENT FOR CLARITY.—Officers and employees of the Federal Government who prescribe regulations to implement this Act and the amendments made by this Act shall make every effort practicable to ensure that the regulations are concise and are easily understandable by potential offerors as well as by Government officials.

"(f) SAVINGS PROVISIONS.—(1) Nothing in this Act shall be construed to affect the validity of any action taken or any contract entered into before the date specified in the regulations pursuant to section 10001(b)(3) [see Effective Date of 1994 Amendment note above] except to the extent and in the manner prescribed in such regulations.

"(2) Except as specifically provided in this Act, nothing in this Act shall be construed to require the renegotiation or modification of contracts in existence on the date of the enactment of this Act [Oct. 13, 1994].

"(3) Except as otherwise provided in this Act, a law amended by this Act shall continue to be applied according to the provisions thereof as such law was in effect on the day before the date of the enactment of this Act until—

"(A) the date specified in final regulations implementing the amendment of that law (as promulgated pursuant to this section); or

"(B) if no such date is specified in regulations, October 1, 1995."

#### EVALUATION BY COMPTROLLER GENERAL

Pub. L. 103-355, title X, §10003, Oct. 13, 1994, 108 Stat. 3405, provided that:

"(a) EVALUATION RELATING TO ISSUANCE OF REGULATIONS.—Not later than 180 days after the issuance in final form of revisions to the Federal Acquisition Regulation pursuant to section 10002 [set out above], the Comptroller General shall submit to Congress a report evaluating compliance with such section.

"(b) EVALUATION OF IMPLEMENTATION OF REGULATIONS.—Not later than 18 months after issuance in final form of revisions to the Federal Acquisition Regulation pursuant to section 10002, the Comptroller General shall submit to the committees referred to in subsection (c) a report evaluating the effectiveness of the regulations implementing this Act [see Short Title of 1994 Amendment note above] in streamlining the acquisition system and fulfilling the other purposes of this Act.

"(c) COMMITTEES DESIGNATED TO RECEIVE THE REPORTS.—The Comptroller General shall submit the reports required by this section to—

"(1) the Committees on Governmental Affairs, on Armed Services, and on Small Business of the Senate; and

“(2) the Committees on Government Operations [now Committee on Government Reform], on Armed Services, and on Small Business of the House of Representatives.”

#### CONGRESSIONAL STATEMENT OF PURPOSE

Pub. L. 98-577, title I, §101, Oct. 30, 1984, 98 Stat. 3066, provided that: “The purposes of this Act are to—

“(1) eliminate procurement procedures and practices that unnecessarily inhibit full and open competition for contracts;

“(2) promote the use of contracting opportunities as a means to expand the industrial base of the United States in order to ensure adequate responsive capability of the economy to the increased demands of the Government in times of national emergency; and

“(3) foster opportunities for the increased participation in the competitive procurement process of small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals.”

#### COMMISSION ON GOVERNMENT PROCUREMENT

Pub. L. 91-129, Nov. 26, 1969, 83 Stat. 269, as amended by Pub. L. 92-47, July 9, 1971, 85 Stat. 102, established the Commission on Government Procurement, which was to study and investigate statutes, rules, regulations, procedures, and practices affecting Government procurement and to submit a final report to Congress on or before Dec. 31, 1972, on the results of this study, including recommendations for changes designed to promote economy, efficiency, and effectiveness in the procurement of goods, services, and facilities by and for the executive branch of the Government. The Commission terminated 120 days after submission of the final report.

#### EX. ORD. NO. 13005. EMPOWERMENT CONTRACTING

Ex. Ord. No. 13005, May 21, 1996, 61 F.R. 26069, provided:

In order to promote economy and efficiency in Federal procurement, it is necessary to secure broad-based competition for Federal contracts. This broad competition is best achieved where there is an expansive pool of potential contractors capable of producing quality goods and services at competitive prices. A great and largely untapped opportunity for expanding the pool of such contractors can be found in this Nation's economically distressed communities.

Fostering growth of Federal contractors in economically distressed communities and ensuring that those contractors become viable businesses for the long term will promote economy and efficiency in Federal procurement and help to empower those communities. Fostering growth of long-term viable contractors will be promoted by offering appropriate incentives to qualified businesses.

Accordingly, by the authority vested in me as President by the Constitution and the laws of the United States, including section 486(a) of title 40, United States Code, and section 301 of title 3, United States Code, it is hereby ordered as follows:

**SECTION 1. Policy.** The purpose of this order is to strengthen the economy and to improve the efficiency of the Federal procurement system by encouraging business development that expands the industrial base and increases competition.

**SEC. 2. Empowerment Contracting Program.** In consultation with the Secretaries of the Departments of Housing and Urban Development, Labor, and Defense; the Administrator of General Services; the Administrator of the National Aeronautics and Space Administration; the Administrator of the Small Business Administration; and the Administrator for Federal Procurement Policy, the Secretary of the Department of Commerce shall develop policies and procedures to ensure that agencies, to the extent permitted by law, grant qualified large businesses and qualified small businesses ap-

propriate incentives to encourage business activity in areas of general economic distress, including a price or an evaluation credit, when assessing offers for government contracts in unrestricted competitions, where the incentives would promote the policy set forth in this order. In developing such policies and procedures, the Secretary shall consider the size of the qualified businesses.

**SEC. 3. Monitoring and Evaluation.** The Secretary shall:

(a) monitor the implementation and operation of the policies and procedures developed in accordance with this order;

(b) develop a process to ensure the proper administration of the program and to reduce the potential for fraud by the intended beneficiaries of the program;

(c) develop principles and a process to evaluate the effectiveness of the policies and procedures developed in accordance with this order; and

(d) by December 1 of each year, issue a report to the President on the status and effectiveness of the program.

**SEC. 4. Implementation Guidelines.** In implementing this order, the Secretary shall:

(a) issue rules, regulations, and guidelines necessary to implement this order, including a requirement for the periodic review of the eligibility of qualified businesses and distressed areas;

(b) draft all rules, regulations, and guidelines necessary to implement this order within 90 days of the date of this order; and

(c) ensure that all policies and procedures and all rules, regulations, and guidelines adopted and implemented in accordance with this order minimize the administrative burden on affected agencies and the procurement process.

**SEC. 5. Definitions.** For purposes of this Executive order:

(a) “Agency” means any authority of the United States that is an “agency” under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10).

(b) “Area of general economic distress” shall be defined, for all urban and rural communities, as any census tract that has a poverty rate of at least 20 percent or any designated Federal Empowerment Zone, Supplemental Empowerment Zone, Enhanced Enterprise Community, or Enterprise Community. In addition, the Secretary may designate as an area of general economic distress any additional rural or Indian reservation area after considering the following factors:

(1) Unemployment rate;

(2) Degree of poverty;

(3) Extent of outmigration; and

(4) Rate of business formation and rate of business growth.

(c) “Qualified large business” means a large for-profit or not-for-profit trade or business that (1) employs a significant number of residents from the area of general economic distress; and (2) either has a significant physical presence in the area of general economic distress or has a direct impact on generating significant economic activity in the area of general economic distress.

(d) “Qualified small business” means a small for-profit or not-for-profit trade or business that (1) employs a significant number of residents from the area of general economic distress; (2) has a significant physical presence in the area of general economic distress; or (3) has a direct impact on generating significant economic activity in the area of general economic distress.

(e) “Secretary” means the Secretary of Commerce.

**SEC. 6. Agency Authority.** Nothing in this Executive order shall be construed as displacing the agencies' authority or responsibilities, as authorized by law, including specifically other programs designed to promote the development of small or disadvantaged businesses.

**SEC. 7. Judicial Review.** This Executive order does not create any right or benefit, substantive or procedural,

enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

WILLIAM J. CLINTON.

#### DEFINITIONS

The definitions in section 472 of Title 40, Public Buildings, Property, and Works, apply to this subchapter.

### § 252. Purchases and contracts for property

#### (a) Applicability of subchapter; delegation of authority

Executive agencies shall make purchases and contracts for property and services in accordance with the provisions of this subchapter and implementing regulations of the Administrator; but this subchapter does not apply—

(1) to the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration; or

(2) when this subchapter is made inapplicable pursuant to section 474(d) of title 40 or any other law, but when this subchapter is made inapplicable by any such provision of law, sections 5 and 8 of this title shall be applicable in the absence of authority conferred by statute to procure without advertising or without regard to said section 5 of this title.

#### (b) Small business concerns; share of business

It is the declared policy of the Congress that a fair proportion of the total purchases and contracts for property and services for the Government shall be placed with small business concerns.

#### (c) Authorization of erection, repair, or furnishing of public buildings or improvements; contracts for construction or repair of buildings, roads, sidewalks, sewers, mains, etc.; Federal Highway Lands Program

(1) This subchapter does not (A) authorize the erection, repair, or furnishing of any public building or public improvement, but such authorization shall be required in the same manner as heretofore, or (B) permit any contract for the construction or repair of buildings, roads, sidewalks, sewers, mains, or similar items using procedures other than sealed-bid procedures under section 253(a)(2)(A) of this title, if the conditions set forth in section 253(a)(2)(A) of this title apply or the contract is to be performed outside the United States.

(2) Section 253(a)(2)(A) of this title does not require the use of sealed-bid procedures in cases in which section 204(e) of title 23 applies.

(June 30, 1949, ch. 288, title III, § 302, 63 Stat. 393; July 12, 1952, ch. 703, § 1(m), 66 Stat. 594; Pub. L. 85-800, §§ 1-3, Aug. 28, 1958, 72 Stat. 966; Pub. L. 89-343, §§ 1, 2, Nov. 8, 1965, 79 Stat. 1303; Pub. L. 89-348, § 1(2), Nov. 8, 1965, 79 Stat. 1310; Pub. L. 90-268, § 4, Mar. 16, 1968, 82 Stat. 50; Pub. L. 93-356, § 3, July 25, 1974, 88 Stat. 390; Pub. L. 98-191, § 9(a)(1), Dec. 1, 1983, 97 Stat. 1331; Pub. L. 98-369, div. B, title VII, § 2714(a)(1), July 18, 1984, 98 Stat. 1184.)

#### AMENDMENTS

1984—Subsec. (b). Pub. L. 98-369, § 2714(a)(1)(A), struck out provisions that whenever it was proposed to make

a contract or purchase in excess of \$10,000 by negotiation and without advertising, pursuant to the authority of subsec. (c)(7) of this section, suitable advance publicity, as determined by the agency head with due regard to the type of property involved and other relevant considerations, had to be given for a period of at least fifteen days, wherever practicable, as determined by the agency head.

Subsec. (c)(1). Pub. L. 98-369, § 2714(a)(1)(B), redesignated subsec. (e) as (c)(1), substituted reference to this subchapter for reference to this section in provisions preceding subpar. (A), in subpar. (B), substituted provisions relating to contracts using procedures other than sealed-bid procedures under section 253(a)(2)(A) of this title for provisions relating to contracts negotiated without advertising as required by section 253 of this title. Former subsec. (c), which related to conditions for negotiated purchases and contracts for property, was struck out.

Subsec. (c)(2). Pub. L. 98-369, § 2714(a)(1)(B), added par. (2).

Subsec. (d). Pub. L. 98-369, § 2714(a)(1)(B), struck out subsec. (d) which related to bids in violation of the antitrust laws.

Subsec. (e). Pub. L. 98-369, § 2714(a)(1)(B), redesignated subsec. (e) as (c)(1).

Subsec. (f). Pub. L. 98-369, § 2714(a)(1)(B), struck out subsec. (f) which related to specification of container size in contracts for the carriage of Government property in other than Government-owned cargo containers.

1983—Subsec. (c)(3). Pub. L. 98-191 substituted “\$25,000” for “\$10,000”.

1974—Subsec. (c)(3). Pub. L. 93-356 substituted “\$10,000” for “\$2,500”.

1968—Subsec. (f). Pub. L. 90-268 added subsec. (f).

1965—Subsec. (a). Pub. L. 89-343, § 1, substituted provisions requiring executive agencies to make purchases and contracts for property and services in accordance with the provisions of this subchapter and implementing regulations of the Administrator, exempting the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration from the application of this subchapter, and making this subchapter inapplicable when it is so made by law, for provisions which made this subchapter applicable to purchases and contracts for property or services made by the General Services Administration for the use of such agency or otherwise, or by any other executive agency (except the departments and activities specified in section 2303(a) of Title 10) in conformity with authority to apply such provisions delegated by the Administrator in his discretion.

Subsec. (c)(11). Pub. L. 89-348 struck out proviso which required a semiannual report to be furnished to the Congress setting forth the name of each contractor with whom a contract has been entered into pursuant to this paragraph, the amount of the contract, and, with due consideration given to the national security, a description of the work required to be performed thereunder.

Subsec. (c)(15). Pub. L. 89-343, § 2, inserted “except that section 254 of this title shall apply to purchases and contracts made without advertising under this paragraph”.

1958—Subsec. (a). Pub. L. 85-800, § 1, among other changes, substituted “or” for “and” in par. (1), substituted provisions excepting application of subchapter to departments and activities in section 2303(a) of title 10 for provisions which excepted agencies named in section 151(a) of this title, substituted provisions applying subchapter to agencies in conformity with authority delegated by Administrator in his discretion for provisions which applied chapter in conformity with authority delegated him pursuant to this subsection, and eliminated provisions authorizing Administrator to delegate authority for use of two or more agencies, and other cases where delegation is advantageous to Government in par. (2).

Subsec. (c). Pub. L. 85-800, § 2, substituted in par. (3) “\$2,500” for “\$1,000”, struck out proviso barring agen-

cies other than General Services Administration from making purchases in excess of \$500 except under authority to procure for two or more agencies, added par. (9), and renumbered former pars. (9) to (14) as pars. (10) to (15).

Subsec. (e). Pub. L. 85-800, §3, substituted “(10) to (12), or (14)” for “(9) to (11), or (13)”.

1952—Subsecs. (a) to (c). Act July 12, 1952, substituted “property” for “supplies” wherever appearing.

#### EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-369 applicable with respect to any solicitation for bids or proposals issued after Mar. 31, 1985, see section 2751 of Pub. L. 98-369, set out as a note under section 251 of this title.

#### EFFECTIVE DATE

Section effective July 1, 1949, see section 605 of act June 30, 1949, set out as a note under section 471 of Title 40, Public Buildings, Property, and Works.

#### EMERGENCY RELIEF FOR SMALL BUSINESS CONCERNS WITH GOVERNMENT CONTRACTS

Pub. L. 94-190, Dec. 31, 1975, 89 Stat. 1095, provided:

##### “SHORT TITLE

“SECTION 1. This Act may be cited as the ‘Small Business Emergency Relief Act’.

##### “POLICY

“SEC. 2. It is the policy of Congress to provide relief to small business concerns which have fixed-price Government contracts in cases where such concerns have suffered or can be expected to suffer serious financial loss because of significant and unavoidable difficulties during performance because of the energy crisis or rapid and unexpected escalations of contract costs.

##### “DEFINITIONS

“SEC. 3. As used in this Act—

“(1) the term ‘executive agency’ means an executive department, a military department, and an independent establishment within the meaning of sections 101, 102, and 104(1) respectively, of title 5, United States Code, and also a wholly owned Government corporation within the meaning of section 101 of the Government Corporation Control Act [section 9101(3) of Title 31, Money and Finance]; and

“(2) the term ‘small business concern’ means any concern which falls under the size limitations of the ‘Small Business Administrator’s Definitions of Small Business for Government Procurement’.

##### “AUTHORITY

“SEC. 4. (a) Pursuant to an application by a small business concern, the head of any executive agency may terminate for the convenience of the Government any fixed-price contract between that agency and such small business concern, upon a finding that—

“(1) during the performance of the contract, the concern has suffered or can be expected to suffer serious financial loss due to significant unanticipated cost increases directly affecting the cost of contract compliance; and

“(2) the conditions which have caused or are causing such cost increases were, or are being, experienced generally by other small business concerns in the market at the same time and are not caused by negligence, underbidding, or other special management factors peculiar to that small business concern.

“(b) Upon application under subsection (a) by a small business concern to terminate a fixed-price contract between an executive agency and such small business concern, the head of the executive agency may modify the terms of the contract in lieu of termination for the convenience of the Government only if he finds after review of the application that—

“(1)(a) the agency would reprocur the supplies or services in the event that the contract was terminated for the convenience of the Government; and

“(b) the cost of terminating the contract for the convenience of the Government plus the cost of reprocurement would exceed the amount of the contract as modified; and

“(2) Any such modification shall be made in compliance with cost comparison and compensation guidelines to be issued by the Administrator of the Office of Federal Procurement Policy. Such cost comparison and compensation guidelines shall be promulgated by the Administrator not later than 10 days after enactment of this Act [Dec. 31, 1975].

“(c) If a small business concern in performance of a fixed-price Government contract experiences or has experienced shortages of energy, petroleum products, or products or components manufactured or derived therefrom or impacted thereby, and such shortages result in a delay in the performance of a contract, the head of the agency, or his designee, shall provide by modification to the contract for an appropriate extension of the contract delivery date or period of performance.

“(d) A small business concern requesting relief under subsection (a) shall support that request with the following documentation and certification:

“(1) a brief description of the contract, indicating the date of execution and of any amendment thereto, the items being procured, the price and delivery schedule, and any revision thereof, and any other special contractual provision as may be relevant to the request;

“(2) a history of performance indicating when work under the contract or commitment was begun, the progress made as of the date of the application, an exact statement of the contractor’s remaining obligations, and the contractor’s expectations regarding completion thereof;

“(3) a statement of the factors which have caused the loss under the contract;

“(4) a statement as to the course of events anticipated if the request is denied;

“(5) a statement of payments received, payments due and payments yet to be received or to become due, including advance and progress payments, and amounts withheld by the Government, and information as to other obligations of the Government, if any, which are yet to be performed under the contract;

“(6) a statement and evidence of the contractor’s original breakdown of estimated costs, including contingency allowances and profit;

“(7) a statement and evidence of the contractor’s present estimate of total costs under the contract if enabled to complete, broken down between costs accrued to date of request, and runout costs, and as between costs for which the contractor has made payment and those for which he is indebted at the time of the request;

“(8) a statement and evidence of the contractor’s estimate of the final price of the contract, giving effect to all escalation, changes, extras, and other comparable factors known or contemplated by the contractor;

“(9) a statement of any claims known or contemplated by the contractor against the Government involving the contract in question, other than those referred to under (8) above;

“(10) an estimate of the contractor’s total profit or loss under the contract if required to complete at the original contract price;

“(11) an estimate of the total profits from other Government business, and all other sources, during the period from the date of the first contract involved to the latest estimated date of completion of any other contracts involved;

“(12) balance sheets, certified by a certified public accountant, as of the end of the contractor’s fiscal year first preceding the date of the first contract, as of the end of each subsequent fiscal year, and as of the date of the request together with income statements for annual periods subsequent to the date of the first balance sheet; and



“(13) a list of all salaries, bonuses, and all other forms of compensation of the principal officers or partners and of all dividends and other withdrawals, and all payments to stockholders in any form since the date of the first contract involved.

#### “DELEGATION

“SEC. 5. The head of each executive agency shall delegate authority conferred by this Act, to the extent practicable, to an appropriate level that will permit the expeditious processing of applications under this Act and to insure the uniformity of its application.

#### “LIMITATIONS

“SEC. 6. (a) The authority prescribed in section 4(a) shall apply only to contracts which have not been completely performed or otherwise terminated and which were entered into during the period from August 15, 1971, through October 31, 1974.

“(b) The authority conferred by section 4(a) of this Act shall terminate September 30, 1976.”

#### NON-APPLICABILITY OF NATIONAL EMERGENCIES ACT

The provisions of the National Emergencies Act (Pub. L. 94-412, Sept. 14, 1976, 90 Stat. 1255) not applicable to the powers and authorities conferred by this section and actions taken hereunder, see section 1651 of Title 50, War and National Defense.

#### EXECUTIVE ORDER NO. 10936

Ex. Ord. No. 10936, Apr. 24, 1961, 26 F.R. 3555, which provided for the reporting and investigation of identical bids in connection with the procurement of goods or services, was revoked by Ex. Ord. No. 12430, July 6, 1983, 48 F.R. 31371.

#### DEFINITIONS

The definitions in section 472 of Title 40, Public Buildings, Property, and Works, apply to this subchapter.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 260 of this title; title 22 sections 2509, 4024; title 23 section 140; title 30 section 1711; title 38 section 8122; title 40 sections 356, 356a; title 50 sections 1432, 1651.

### § 252a. Simplified acquisition threshold

#### (a) Simplified acquisition threshold

For purposes of acquisitions by executive agencies, the simplified acquisition threshold is as specified in section 403(11) of this title.

#### (b) Inapplicable laws

No law properly listed in the Federal Acquisition Regulation pursuant to section 429 of this title shall apply to or with respect to a contract or subcontract that is not greater than the simplified acquisition threshold.

(June 30, 1949, ch. 288, title III, § 302A, as added and amended Pub. L. 103-355, title IV, §§ 4003, 4103(a), Oct. 13, 1994, 108 Stat. 3338, 3341.)

#### AMENDMENTS

1994—Subsec. (b). Pub. L. 103-355, § 4103(a), added subsec. (b).

#### EFFECTIVE DATE

For effective date and applicability of section, see section 10001 of Pub. L. 103-355, set out as an Effective Date of 1994 Amendment note under section 251 of this title.

### § 252b. Implementation of simplified acquisition procedures

The simplified acquisition procedures contained in the Federal Acquisition Regulation

pursuant to section 427 of this title shall apply in executive agencies as provided in such section.

(June 30, 1949, ch. 288, title III, § 302B, as added Pub. L. 103-355, title IV, § 4203(b), Oct. 13, 1994, 108 Stat. 3346.)

#### EFFECTIVE DATE

For effective date and applicability of section, see section 10001 of Pub. L. 103-355, set out as an Effective Date of 1994 Amendment note under section 251 of this title.

### § 252c. Implementation of electronic commerce capability

#### (a) Implementation of electronic commerce capability

(1) The head of each executive agency shall implement the electronic commerce capability required by section 426 of this title.

(2) In implementing the electronic commerce capability pursuant to paragraph (1), the head of an executive agency shall consult with the Administrator for Federal Procurement Policy.

#### (b) Designation of agency official

The head of each executive agency shall designate a program manager to implement the electronic commerce capability for that agency. The program manager shall report directly to an official at a level not lower than the senior procurement executive designated for the executive agency under section 414(3) of this title.

(June 30, 1949, ch. 288, title III, § 302C, as added Pub. L. 103-355, title IX, § 9003, Oct. 13, 1994, 108 Stat. 3403; amended Pub. L. 105-85, div. A, title VIII, § 850(f)(4)(A), Nov. 18, 1997, 111 Stat. 1850.)

#### AMENDMENTS

1997—Pub. L. 105-85 amended section catchline and text generally. Prior to amendment, text read as follows:

“(a) IMPLEMENTATION OF FACNET CAPABILITY.—(1) The head of each executive agency shall implement the Federal acquisition computer network (‘FACNET’) capability required by section 426 of this title.

“(2) In implementing the FACNET capability pursuant to paragraph (1), the head of an executive agency shall consult with the Administrator for Federal Procurement Policy.

“(b) DESIGNATION OF AGENCY OFFICIAL.—The head of each executive agency shall designate a program manager to have responsibility for implementation of FACNET capability for that agency and otherwise to implement this section. Such program manager shall report directly to the senior procurement executive designated for the executive agency under section 414(3) of this title.”

#### EFFECTIVE DATE OF 1997 AMENDMENT

Amendment by Pub. L. 105-85 effective 180 days after Nov. 18, 1997, see section 850(g) of Pub. L. 105-85, set out as a note under section 2302c of Title 10, Armed Forces.

#### EFFECTIVE DATE

For effective date and applicability of section, see section 10001 of Pub. L. 103-355, set out as an Effective Date of 1994 Amendment note under section 251 of this title.

### § 253. Competition requirements

#### (a) Procurement through full and open competition; competitive procedures

(1) Except as provided in subsections (b), (c), and (g) of this section and except in the case of

procurement procedures otherwise expressly authorized by statute, an executive agency in conducting a procurement for property or services—

(A) shall obtain full and open competition through the use of competitive procedures in accordance with the requirements of this title and the Federal Acquisition Regulation; and

(B) shall use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement.

(2) In determining the competitive procedures appropriate under the circumstance, an executive agency—

(A) shall solicit sealed bids if—

(i) time permits the solicitation, submission, and evaluation of sealed bids;

(ii) the award will be made on the basis of price and other price-related factors;

(iii) it is not necessary to conduct discussions with the responding sources about their bids; and

(iv) there is a reasonable expectation of receiving more than one sealed bid; and

(B) shall request competitive proposals if sealed bids are not appropriate under clause (A).

**(b) Exclusion of particular source; restriction of solicitation to small business concerns**

(1) An executive agency may provide for the procurement of property or services covered by this section using competitive procedures but excluding a particular source in order to establish or maintain any alternative source or sources of supply for that property or service if the agency head determines that to do so—

(A) would increase or maintain competition and would likely result in reduced overall costs for such procurement, or for any anticipated procurement, of such property or services;

(B) would be in the interest of national defense in having a facility (or a producer, manufacturer, or other supplier) available for furnishing the property or service in case of a national emergency or industrial mobilization;

(C) would be in the interest of national defense in establishing or maintaining an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center;

(D) would ensure the continuous availability of a reliable source of supply of such property or service;

(E) would satisfy projected needs for such property or service determined on the basis of a history of high demand for the property or service; or

(F) in the case of medical supplies, safety supplies, or emergency supplies, would satisfy a critical need for such supplies.

(2) An executive agency may provide for the procurement of property or services covered by this section using competitive procedures, but excluding other than small business concerns in furtherance of sections 638 and 644 of title 15;

(3) A contract awarded pursuant to the competitive procedures referred to in paragraphs (1)

and (2) shall not be subject to the justification and approval required by subsection (f)(1) of this section.

(4) A determination under paragraph (1) may not be made for a class of purchases or contracts.

**(c) Use of noncompetitive procedures**

An executive agency may use procedures other than competitive procedures only when—

(1) the property or services needed by the executive agency are available from only one responsible source and no other type of property or services will satisfy the needs of the executive agency;

(2) the executive agency's need for the property or services is of such an unusual and compelling urgency that the Government would be seriously injured unless the executive agency is permitted to limit the number of sources from which it solicits bids or proposals;

(3) it is necessary to award the contract to a particular source or sources in order (A) to maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency or to achieve industrial mobilization, (B) to establish or maintain an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center, or (C) to procure the services of an expert for use, in any litigation or dispute (including any reasonably foreseeable litigation or dispute) involving the Federal Government, in any trial, hearing, or proceeding before any court, administrative tribunal, or agency, or to procure the services of an expert or neutral for use in any part of an alternative dispute resolution or negotiated rulemaking process, whether or not the expert is expected to testify;

(4) the terms of an international agreement or treaty between the United States Government and a foreign government or international organization, or the written directions of a foreign government reimbursing the executive agency for the cost of the procurement of the property or services for such government, have the effect of requiring the use of procedures other than competitive procedures;

(5) subject to subsection (h)<sup>1</sup> of this section, a statute expressly authorizes or requires that the procurement be made through another executive agency or from a specified source, or the agency's need is for a brand-name commercial item for authorized resale;

(6) the disclosure of the executive agency's needs would compromise the national security unless the agency is permitted to limit the number of sources from which it solicits bids or proposals; or

(7) the head of the executive agency—

(A) determines that it is necessary in the public interest to use procedures other than competitive procedures in the particular procurement concerned, and

(B) notifies the Congress in writing of such determination not less than 30 days before the award of the contract.

<sup>1</sup> See References in Text note below.

**(d) Property or services deemed available from only one source; nondelegable authority**

(1) For the purposes of applying subsection (c)(1) of this section—

(A) in the case of a contract for property or services to be awarded on the basis of acceptance of an unsolicited research proposal, the property or services shall be considered to be available from only one source if the source has submitted an unsolicited research proposal that demonstrates a unique and innovative concept the substance of which is not otherwise available to the United States and does not resemble the substance of a pending competitive procurement; and

(B) in the case of a follow-on contract for the continued development or production of a major system or highly specialized equipment when it is likely that award to a source other than the original source would result in (i) substantial duplication of cost to the Government which is not expected to be recovered through competition, or (ii) unacceptable delays in fulfilling the executive agency's needs, such property may be deemed to be available only from the original source and may be procured through procedures other than competitive procedures.

(2) The authority of the head of an executive agency under subsection (c)(7) of this section may not be delegated.

**(e) Offer requests to potential sources**

An executive agency using procedures other than competitive procedures to procure property or services by reason of the application of subsection (c)(2) or (c)(6) of this section shall request offers from as many potential sources as is practicable under the circumstances.

**(f) Justification for use of noncompetitive procedures**

(1) Except as provided in paragraph (2), an executive agency may not award a contract using procedures other than competitive procedures unless—

(A) the contracting officer for the contract justifies the use of such procedures in writing and certifies the accuracy and completeness of the justification;

(B) the justification is approved—

(i) in the case of a contract for an amount exceeding \$500,000 (but equal to or less than \$10,000,000), by the competition advocate for the procuring activity (without further delegation) or by an official referred to in clause (ii) or (iii); and

(ii) in the case of a contract for an amount exceeding \$10,000,000 (but equal to or less than \$50,000,000), by the head of the procuring activity or a delegate who, if a member of the armed forces, is a general or flag officer or, if a civilian, is serving in a position in grade GS-16 or above under the General Schedule (or in a comparable or higher position under another schedule); or

(iii) in the case of a contract for an amount exceeding \$50,000,000, by the senior procurement executive of the agency designated pursuant to section 414(3) of this title (without further delegation); and

(C) any required notice has been published with respect to such contract pursuant to section 416 of this title and all bids or proposals received in response to such notice have been considered by such executive agency.

(2) In the case of a procurement permitted by subsection (c)(2), the justification and approval required by paragraph (1) may be made after the contract is awarded. The justification and approval required by paragraph (1) is not required—

(A) when a statute expressly requires that the procurement be made from a specified source;

(B) when the agency's need is for a brand-name commercial item for authorized resale;

(C) in the case of a procurement permitted by subsection (c)(7) of this section; or

(D) in the case of a procurement conducted under (i) the Javits-Wagner-O'Day Act (41 U.S.C. 46 et seq.), or (ii) section 637(a) of title 15.

(3) The justification required by paragraph (1)(A) shall include—

(A) a description of the agency's needs;

(B) an identification of the statutory exception from the requirement to use competitive procedures and a demonstration, based on the proposed contractor's qualifications or the nature of the procurement, of the reasons for using that exception;

(C) a determination that the anticipated cost will be fair and reasonable;

(D) a description of the market survey conducted or a statement of the reasons a market survey was not conducted;

(E) a listing of the sources, if any, that expressed in writing an interest in the procurement; and

(F) a statement of the actions, if any, the agency may take to remove or overcome a barrier to competition before a subsequent procurement for such needs.

(4) The justification required by paragraph (1)(A) and any related information shall be made available for inspection by the public consistent with the provisions of section 552 of title 5.

(5) In no case may an executive agency—

(A) enter into a contract for property or services using procedures other than competitive procedures on the basis of the lack of advance planning or concerns related to the amount of funds available to the agency for procurement functions; or

(B) procure property or services from another executive agency unless such other executive agency complies fully with the requirements of this subchapter in its procurement of such property or services.

The restriction set out in clause (B) is in addition to, and not in lieu of, any other restriction provided by law.

**(g) Simplified procedures for small purchases**

(1) In order to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors, the Federal Acquisition Regulation shall provide for—

(A) special simplified procedures for purchases of property and services for amounts

not greater than the simplified acquisition threshold; and

(B) special simplified procedures for purchases of property and services for amounts greater than the simplified acquisition threshold but not greater than \$5,000,000 with respect to which the contracting officer reasonably expects, based on the nature of the property or services sought and on market research, that offers will include only commercial items.

(2)(A) The Administrator of General Services shall prescribe regulations that provide special simplified procedures for acquisitions of leasehold interests in real property at rental rates that do not exceed the simplified acquisition threshold.

(B) For purposes of subparagraph (A), the rental rate or rates under a multiyear lease do not exceed the simplified acquisition threshold if the average annual amount of the rent payable for the period of the lease does not exceed the simplified acquisition threshold.

(3) A proposed purchase or contract for an amount above the simplified acquisition threshold may not be divided into several purchases or contracts for lesser amounts in order to use the simplified procedures required by paragraph (1).

(4) In using the simplified procedures, an executive agency shall promote competition to the maximum extent practicable.

(5) An executive agency shall comply with the Federal Acquisition Regulation provisions referred to in section 427(f) of this title.

#### **(h) Efficient implementation of requirement**

The Federal Acquisition Regulation shall ensure that the requirement to obtain full and open competition is implemented in a manner that is consistent with the need to efficiently fulfill the Government's requirements.

#### **(i) Merit-based award of contracts**

(1) It is the policy of Congress that an executive agency should not be required by legislation to award a new contract to a specific non-Federal Government entity. It is further the policy of Congress that any program, project, or technology identified in legislation be procured through merit-based selection procedures.

(2) A provision of law may not be construed as requiring a new contract to be awarded to a specified non-Federal Government entity unless that provision of law—

(A) specifically refers to this subsection;

(B) specifically identifies the particular non-Federal Government entity involved; and

(C) specifically states that the award to that entity is required by such provision of law in contravention of the policy set forth in paragraph (1).

(3) For purposes of this subsection, a contract is a new contract unless the work provided for in the contract is a continuation of the work performed by the specified entity under a preceding contract.

(4) This subsection shall not apply with respect to any contract that calls upon the National Academy of Sciences to investigate, examine, or experiment upon any subject of science or art of significance to an executive agency and to report on such matters to the

Congress or any agency of the Federal Government.

(June 30, 1949, ch. 288, title III, §303, 63 Stat. 395; July 12, 1952, ch. 703, §1(m), 66 Stat. 594; Pub. L. 90-268, §2, Mar. 16, 1968, 82 Stat. 49; Pub. L. 98-369, div. B, title VII, §2711(a)(1), July 18, 1984, 98 Stat. 1175; Pub. L. 98-577, title V, §504(a)(1), (2), Oct. 30, 1984, 98 Stat. 3086; Pub. L. 99-145, title IX, §961(a)(2), title XIII, §1304(c)(2), (3), Nov. 8, 1985, 99 Stat. 703, 742; Pub. L. 101-510, div. A, title VIII, §806(c), Nov. 5, 1990, 104 Stat. 1592; Pub. L. 103-355, title I, §§1051-1053, 1055(a), title IV, §4402(a), title VII, §7203(b)(1), Oct. 13, 1994, 108 Stat. 3260, 3261, 3265, 3348, 3380; Pub. L. 104-106, div. D, title XLI, §§4101(b), 4102(b), title XLII, §4202(b)(1), title XLIII, §4321(e)(2), Feb. 10, 1996, 110 Stat. 642, 643, 653, 674; Pub. L. 104-320, §§7(a)(2), 11(c)(2), Oct. 19, 1996, 110 Stat. 3871, 3873; Pub. L. 105-85, div. A, title VIII, §850(f)(4)(B), Nov. 18, 1997, 111 Stat. 1850.)

#### REFERENCES IN TEXT

Subsection (h) of this section, referred to in subsec. (c)(5), was redesignated subsec. (i) and a new subsec. (h) was added by Pub. L. 104-106, div. D, title XLI, §4101(b), Feb. 10, 1996, 110 Stat. 642.

The Javits-Wagner-O'Day Act, referred to in subsec. (f)(2)(D), is act June 25, 1938, ch. 697, 52 Stat. 1196, as amended, which is classified to sections 46 to 48c of this title. For complete classification of this Act to the Code, see Tables.

#### AMENDMENTS

1997—Subsec. (g)(5). Pub. L. 105-85 substituted “section 427(f)” for “section 427(g)”.

1996—Subsec. (c)(3)(C). Pub. L. 104-320 substituted “agency, or to procure the services of an expert or neutral for use” for “agency, or” and inserted “or negotiated rulemaking” after “alternative dispute resolution”.

Subsec. (f)(1)(B)(i). Pub. L. 104-106, §4102(b)(1), substituted “\$500,000 (but equal to or less than \$10,000,000)” for “\$100,000 (but equal to or less than \$1,000,000)” and “(ii) or (iii); and” for “(ii), (iii), or (iv);”.

Subsec. (f)(1)(B)(ii). Pub. L. 104-106, §4102(b)(2), substituted “\$10,000,000 (but equal to or less than \$50,000,000)” for “\$1,000,000 (but equal to or less than \$10,000,000)” and “civilian,” for “civilian;”.

Subsec. (f)(1)(B)(iii). Pub. L. 104-106, §4102(b)(3), substituted “\$50,000,000” for “\$10,000,000”.

Subsec. (f)(2)(D). Pub. L. 104-106, §4321(e)(2), substituted “the Javits-Wagner-O'Day Act (41 U.S.C. 46 et seq.)” for “the Act of June 25, 1938 (41 U.S.C. 46 et seq.), popularly referred to as the Wagner-O'Day Act,”.

Subsec. (g)(1). Pub. L. 104-106, §4202(b)(1)(A), substituted “shall provided for—” for “shall provide for special simplified procedures for purchases of property and services for amounts not greater than the simplified acquisition threshold.” and added subpars. (A) and (B).

Subsec. (g)(5). Pub. L. 104-106, §4202(b)(1)(B), added par. (5).

Subsecs. (h), (i). Pub. L. 104-106, §4101(b), added subsec. (h) and redesignated former subsec. (h) as (i).

1994—Subsec. (a)(1)(A). Pub. L. 103-355, §1051(1), substituted “Federal Acquisition Regulation” for “modifications to regulations promulgated pursuant to section 2752 of the Competition in Contracting Act of 1984”.

Subsec. (b)(1)(D) to (F). Pub. L. 103-355, §1052(a), added subpars. (D) to (F).

Subsec. (b)(4). Pub. L. 103-355, §1052(b), added par. (4).

Subsec. (c)(3). Pub. L. 103-355, §1055(a), struck out “or” before “(B)” and inserted “, or” and cl. (C) before period at end.

Subsec. (c)(5). Pub. L. 103-355, §7203(b)(1)(A), inserted “subject to subsection (h) of this section,” before “a statute”.

Subsec. (f)(1)(B)(i). Pub. L. 103-355, §1053, inserted before semicolon at end “or by an official referred to in clause (ii), (iii), or (iv)”.

Pub. L. 103-355, §4402(a)(1)(A), substituted “purchases of property and services for amounts not greater than the simplified acquisition threshold” for “small purchases of property and services”.

Pub. L. 103-355, §§1051(2), 4402(a)(1)(B), amended par. (1) identically, substituting “Federal Acquisition Regulation” for “regulations modified, in accordance with section 2752 of the Competition in Contracting Act of 1984.”

Subsec. (g)(2). Pub. L. 103-355, §4402(a)(2), added par. (2) and struck out former par. (2) which read as follows: “For the purposes of this subchapter, a small purchase is a purchase or contract for an amount which does not exceed the small purchase threshold.”

Subsec. (g)(3). Pub. L. 103-355, §4402(a)(3), substituted “simplified acquisition threshold” for “small purchase threshold” and “simplified procedures” for “small purchase procedures”.

Subsec. (g)(4). Pub. L. 103-355, §4402(a)(4), substituted “the simplified procedures” for “small purchase procedures”.

Subsec. (g)(5). Pub. L. 103-355, §4402(a)(5), struck out par. (5) which read as follows: “In this subsection, the term ‘small purchase threshold’ has the meaning given such term in section 403(11) of this title.”

Subsec. (h). Pub. L. 103-355, §7203(b)(1)(B), added subsec. (h).

1990—Subsec. (g)(2), (3). Pub. L. 101-510, §806(c)(1), (2), substituted “the small purchase threshold” for “\$25,000”.

Subsec. (g)(5). Pub. L. 101-510, §806(c)(3), added par. (5).

1985—Subsec. (f)(1)(C). Pub. L. 99-145, §1304(c)(2), substituted “any” for “Any”.

Subsec. (f)(2). Pub. L. 99-145, §961(a)(2), added subpars. (A) and (B), designated existing provision as subpar. (C), and redesignated as subpar. (D), cls. (i) and (ii) provisions previously designated subpars. (A) and (B), substituting in cl. (ii) “section 637(a) of title 15” for “the authority of section 637(a) of title 15”.

Subsec.(g)(1). Pub. L. 99-145, §1304(c)(3), inserted a comma after “1984”.

1984—Subsec. (a). Pub. L. 98-369 substituted provisions requiring procurement through full and open competition for provisions requiring advertisement for bids to be made a sufficient time prior to the purchase or contract and to permit full and free competition, and struck out provision that no advertisement or bid invitation for carriage of Government property in other than Government-owned cargo containers could specify carriage in cargo containers of any stated length, height, or width.

Subsec. (b). Pub. L. 98-369 substituted provisions regarding the exclusion of a particular source of property or services from competitive procedures for provisions regarding the opening of bids and procedures for awards, and inserted provision that in fulfilling the statutory requirements relating to small business concerns and socially and economically disadvantaged small business concerns, an executive agency shall use competitive procedures but may restrict a solicitation to allow only such business concerns to compete.

Subsec. (b)(2). Pub. L. 98-577, §504(a)(1), substituted provisions to the effect that executive agencies may provide for procurement of property or services covered by this section using competitive procedures but excluding other than small business concerns for former provisions which provided that executive agencies shall use competitive procedures but may restrict a solicitation to allow only such small business concerns to compete.

Subsec. (b)(3). Pub. L. 98-577, §504(a)(1), added par. (3). Subsecs. (c) to (g). Pub. L. 98-369 added subsecs. (c) to (g).

Subsec. (f)(2). Pub. L. 98-577, §504(a)(2), designated the final sentence as subpar. (A) and added subpar. (B).

1968—Subsec. (a). Pub. L. 90-268 inserted provision that no advertisement or invitation to bid for carriage

of Government property in other than Government-owned cargo containers shall specify carriage of such property in cargo containers of any stated length, height, or width.

1952—Subsec. (a). Act July 12, 1952, substituted “property” for “supplies”.

#### EFFECTIVE DATE OF 1997 AMENDMENT

Amendment by Pub. L. 105-85 effective 180 days after Nov. 18, 1997, see section 850(g) of Pub. L. 105-85, set out as a note under section 2302c of Title 10, Armed Forces.

#### EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104-106, see section 4401 of Pub. L. 104-106, set out as a note under section 251 of this title.

#### EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103-355, see section 10001 of Pub. L. 103-355, set out as a note under section 251 of this title.

#### EFFECTIVE DATE OF 1985 AMENDMENT

Amendment by section 961(a)(2) of Pub. L. 99-145 effective as if included in enactment of Competition in Contracting Act of 1984, Pub. L. 98-369, div. B, title VII, see section 961(e) of Pub. L. 99-145, set out as a note under section 2304 of Title 10, Armed Forces.

#### EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-369 applicable with respect to any solicitation for bids or proposals issued after Mar. 31, 1985, see section 2751 of Pub. L. 98-369, set out as a note under section 251 of this title.

#### EFFECTIVE DATE

Section effective July 1, 1949, see section 605 of act June 30, 1949, set out as a note under section 471 of Title 40, Public Buildings, Property, and Works.

#### TERMINATION OF AUTHORITY TO ISSUE SOLICITATIONS FOR PURCHASES OF COMMERCIAL ITEMS IN EXCESS OF SIMPLIFIED ACQUISITION THRESHOLD

Authority to issue solicitations for purchases of commercial items in excess of simplified acquisition threshold pursuant to special simplified procedures authorized by subsec. (g)(1) of this section to expire three years after date certain amendments by section 4202 of Pub. L. 104-106 take effect pursuant to section 4401(b) of Pub. L. 104-106, set out as a note under section 251 of this title, see section 4202(e) of Pub. L. 104-106, set out as a note under section 2304 of Title 10, Armed Forces.

#### REFERENCES IN OTHER LAWS TO GS-16, 17, OR 18 PAY RATES

References in laws to the rates of pay for GS-16, 17, or 18, or to maximum rates of pay under the General Schedule, to be considered references to rates payable under specified sections of Title 5, Government Organization and Employees, see section 529 [title I, §101(c)(1)] of Pub. L. 101-509, set out in a note under section 5376 of Title 5.

#### SMALL BUSINESS ACT

Section 2711(c) of Pub. L. 98-369 provided that: “The amendments made by this section [amending this section and section 259 of this title and enacting sections 253a and 253b of this title] do not supersede or affect the provisions of section 8(a) of the Small Business Act (15 U.S.C. 637(a)).”

#### DEFINITIONS

The definitions in section 472 of Title 40, Public Buildings, Property, and Works, apply to this subchapter.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 252, 253h, 253i, 253j, 257, 416, 417, 427 of this title; title 15 section 637;

title 20 section 1018a; title 22 section 2669; title 29 section 2887; title 38 section 8153; title 40 section 618; title 49 section 40110; title 50 App. section 2077.

### **§ 253a. Planning and solicitation requirements**

#### **(a) Preparation; planning; specifications in solicitation**

(1) In preparing for the procurement of property or services, an executive agency shall—

(A) specify its needs and solicit bids or proposals in a manner designed to achieve full and open competition for the procurement;

(B) use advance procurement planning and market research; and

(C) develop specifications in such manner as is necessary to obtain full and open competition with due regard to the nature of the property or services to be acquired.

(2) Each solicitation under this subchapter shall include specifications which—

(A) consistent with the provisions of this subchapter, permit full and open competition;

(B) include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the executive agency or as authorized by law.

(3) For the purposes of paragraphs (1) and (2), the type of specification included in a solicitation shall depend on the nature of the needs of the executive agency and the market available to satisfy such needs. Subject to such needs, specifications may be stated in terms of—

(A) function, so that a variety of products or services may qualify;

(B) performance, including specifications of the range of acceptable characteristics or of the minimum acceptable standards; or

(C) design requirements.

#### **(b) Contents of solicitation**

In addition to the specifications described in subsection (a) of this section, each solicitation for sealed bids or competitive proposals (other than for a procurement for commercial items using special simplified procedures or a purchase for an amount not greater than the simplified acquisition threshold) shall at a minimum include—

(1) a statement of—

(A) all significant factors and significant subfactors which the executive agency reasonably expects to consider in evaluating sealed bids (including price) or competitive proposals (including cost or price, cost-related or price-related factors and subfactors, and noncost-related or nonprice-related factors and subfactors); and

(B) the relative importance assigned to each of those factors and subfactors; and

(2)(A) in the case of sealed bids—

(i) a statement that sealed bids will be evaluated without discussions with the bidders; and

(ii) the time and place for the opening of the sealed bids; or

(B) in the case of competitive proposals—

(i) either a statement that the proposals are intended to be evaluated with, and award made after, discussions with the offerors, or

a statement that the proposals are intended to be evaluated, and award made, without discussions with the offerors (other than discussions conducted for the purpose of minor clarification) unless discussions are determined to be necessary; and

(ii) the time and place for submission of proposals.

#### **(c) Evaluation factors**

(1) In prescribing the evaluation factors to be included in each solicitation for competitive proposals, an executive agency—

(A) shall clearly establish the relative importance assigned to the evaluation factors and subfactors, including the quality of the product or services to be provided (including technical capability, management capability, prior experience, and past performance of the offeror);

(B) shall include cost or price to the Federal Government as an evaluation factor that must be considered in the evaluation of proposals; and

(C) shall disclose to offerors whether all evaluation factors other than cost or price, when combined, are—

(i) significantly more important than cost or price;

(ii) approximately equal in importance to cost or price; or

(iii) significantly less important than cost or price.

(2) The regulations implementing subparagraph (C) of paragraph (1) may not define the terms “significantly more important” and “significantly less important” as specific numeric weights that would be applied uniformly to all solicitations or a class of solicitations.

#### **(d) Additional information in solicitation**

Nothing in this section prohibits an executive agency from—

(1) providing additional information in a solicitation, including numeric weights for all evaluation factors and subfactors on a case-by-case basis; or

(2) stating in a solicitation that award will be made to the offeror that meets the solicitation’s mandatory requirements at the lowest cost or price.

#### **(e) Evaluation of purchase options**

An executive agency, in issuing a solicitation for a contract to be awarded using sealed bid procedures, may not include in such solicitation a clause providing for the evaluation of prices for options to purchase additional property or services under the contract unless the executive agency has determined that there is a reasonable likelihood that the options will be exercised.

(June 30, 1949, ch. 288, title III, §303A, as added Pub. L. 98-369, div. B, title VII, §2711(a)(2), July 18, 1984, 98 Stat. 1178; amended Pub. L. 103-355, title I, §§1061(a), (b), 1062, title IV, §4402(b), Oct. 13, 1994, 108 Stat. 3266, 3267, 3348; Pub. L. 104-106, div. D, title XLII, §4202(b)(2), Feb. 10, 1996, 110 Stat. 653.)

#### **AMENDMENTS**

1996—Subsec. (b). Pub. L. 104-106 inserted “a procurement for commercial items using special simplified

procedures or” after “(other than for” in introductory provisions.

1994—Subsec. (b). Pub. L. 103-355, § 4402(b), substituted “a purchase for an amount not greater than the simplified acquisition threshold)” for “small purchases)” in introductory provisions.

Subsec. (b)(1)(A). Pub. L. 103-355, § 1061(a)(1)(A), amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows: “all significant factors (including price) which the executive agency reasonably expects to consider in evaluating sealed bids or competitive proposals; and”.

Subsec. (b)(1)(B). Pub. L. 103-355, § 1061(a)(1)(B), substituted “factors and subfactors” for “factors”.

Subsec. (b)(2)(B)(i). Pub. L. 103-355, § 1061(a)(2), amended cl. (i) generally. Prior to amendment, cl. (i) read as follows: “a statement that the proposals are intended to be evaluated with, and awards made after, discussions with the offerors, but might be evaluated and awarded without discussions with the offerors; and”.

Subsecs. (c), (d). Pub. L. 103-355, § 1061(b), added subsecs. (c) and (d).

Subsec. (e). Pub. L. 103-355, § 1062, added subsec. (e).

#### EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104-106, see section 4401 of Pub. L. 104-106, set out as a note under section 251 of this title.

#### EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103-355, see section 10001 of Pub. L. 103-355, set out as a note under section 251 of this title.

#### EFFECTIVE DATE

Section applicable with respect to any solicitation for bids or proposals issued after Mar. 31, 1985, see section 2751 of Pub. L. 98-369, set out as an Effective Date of 1984 Amendment note under section 251 of this title.

#### SMALL BUSINESS ACT

Section not to affect or supersede the provisions of section 637(a) of Title 15, Commerce and Trade, see section 2711(c) of Pub. L. 98-369, set out as a note under section 253 of this title.

#### DEFINITIONS

The definitions in section 472 of Title 40, Public Buildings, Property, and Works, apply to this subchapter.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 253b, 253m, 257 of this title; title 20 section 1018a.

### § 253b. Evaluation and award

#### (a) Basis

An executive agency shall evaluate sealed bids and competitive proposals, and award a contract, based solely on the factors specified in the solicitation.

#### (b) Rejection of bids or proposals

All sealed bids or competitive proposals received in response to a solicitation may be rejected if the agency head determines that such action is in the public interest.

#### (c) Opening of bids; promptness of award; written notice

Sealed bids shall be opened publicly at the time and place stated in the solicitation. The executive agency shall evaluate the bids in accordance with subsection (a) of this section without discussions with the bidders and, except

as provided in subsection (b) of this section, shall award a contract with reasonable promptness to the responsible source whose bid conforms to the solicitation and is most advantageous to the United States, considering only price and the other price-related factors included in the solicitation. The award of a contract shall be made by transmitting, in writing or by electronic means, notice of the award to the successful bidder. Within 3 days after the date of contract award, the executive agency shall notify, in writing or by electronic means, each bidder not awarded the contract that the contract has been awarded.

#### (d) Discussions with offerors; written notification

(1) An executive agency shall evaluate competitive proposals in accordance with subsection (a) of this section and may award a contract—

(A) after discussions with the offerors, provided that written or oral discussions have been conducted with all responsible offerors who submit proposals within the competitive range; or

(B) based on the proposals received and without discussions with the offerors (other than discussions conducted for the purpose of minor clarification), if, as required by section 253a(b)(2)(B)(i) of this title, the solicitation included a statement that proposals are intended to be evaluated, and award made, without discussions, unless discussions are determined to be necessary.

(2) If the contracting officer determines that the number of offerors that would otherwise be included in the competitive range under paragraph (1)(A) exceeds the number at which an efficient competition can be conducted, the contracting officer may limit the number of proposals in the competitive range, in accordance with the criteria specified in the solicitation, to the greatest number that will permit an efficient competition among the offerors rated most highly in accordance with such criteria.

(3) Except as otherwise provided in subsection (b) of this section, the executive agency shall award a contract with reasonable promptness to the responsible source whose proposal is most advantageous to the United States, considering only cost or price and the other factors included in the solicitation. The executive agency shall award the contract by transmitting, in writing or by electronic means, notice of the award to such source and, within 3 days after the date of contract award, shall notify, in writing or by electronic means, all other offerors of the rejection of their proposals.

#### (e) Post-award debriefings

(1) When a contract is awarded by the head of an executive agency on the basis of competitive proposals, an unsuccessful offeror, upon written request received by the agency within 3 days after the date on which the unsuccessful offeror receives the notification of the contract award, shall be debriefed and furnished the basis for the selection decision and contract award. The executive agency shall debrief the offeror within, to the maximum extent practicable, 5 days after receipt of the request by the executive agency.

(2) The debriefing shall include, at a minimum—

(A) the executive agency's evaluation of the significant weak or deficient factors in the offeror's offer;

(B) the overall evaluated cost and technical rating of the offer of the contractor awarded the contract and the overall evaluated cost and technical rating of the offer of the debriefed offeror;

(C) the overall ranking of all offers;

(D) a summary of the rationale for the award;

(E) in the case of a proposal that includes a commercial item that is an end item under the contract, the make and model of the item being provided in accordance with the offer of the contractor awarded the contract; and

(F) reasonable responses to relevant questions posed by the debriefed offeror as to whether source selection procedures set forth in the solicitation, applicable regulations, and other applicable authorities were followed by the executive agency.

(3) The debriefing may not include point-by-point comparisons of the debriefed offeror's offer with other offers and may not disclose any information that is exempt from disclosure under section 552(b) of title 5.

(4) Each solicitation for competitive proposals shall include a statement that information described in paragraph (2) may be disclosed in post-award debriefings.

(5) If, within one year after the date of the contract award and as a result of a successful procurement protest, the executive agency seeks to fulfill the requirement under the protested contract either on the basis of a new solicitation of offers or on the basis of new best and final offers requested for that contract, the head of such executive agency shall make available to all offerors—

(A) the information provided in debriefings under this subsection regarding the offer of the contractor awarded the contract; and

(B) the same information that would have been provided to the original offerors.

**(f) Preaward debriefings**

(1) When the contracting officer excludes an offeror submitting a competitive proposal from the competitive range (or otherwise excludes such an offeror from further consideration prior to the final source selection decision), the excluded offeror may request in writing, within 3 days after the date on which the excluded offeror receives notice of its exclusion, a debriefing prior to award. The contracting officer shall make every effort to debrief the unsuccessful offeror as soon as practicable but may refuse the request for a debriefing if it is not in the best interests of the Government to conduct a debriefing at that time.

(2) The contracting officer is required to debrief an excluded offeror in accordance with subsection (e) of this section only if that offeror requested and was refused a preaward debriefing under paragraph (1) of this subsection.

(3) The debriefing conducted under this subsection shall include—

(A) the executive agency's evaluation of the significant elements in the offeror's offer;

(B) a summary of the rationale for the offeror's exclusion; and

(C) reasonable responses to relevant questions posed by the debriefed offeror as to whether source selection procedures set forth in the solicitation, applicable regulations, and other applicable authorities were followed by the executive agency.

(4) The debriefing conducted pursuant to this subsection may not disclose the number or identity of other offerors and shall not disclose information about the content, ranking, or evaluation of other offerors' proposals.

**(g) Summary of debriefing**

The contracting officer shall include a summary of any debriefing conducted under subsection (e) or (f) of this section in the contract file.

**(h) Alternative dispute resolution**

The Federal Acquisition Regulation shall include a provision encouraging the use of alternative dispute resolution techniques to provide informal, expeditious, and inexpensive procedures for an offeror to consider using before filing a protest, prior to the award of a contract, of the exclusion of the offeror from the competitive range (or otherwise from further consideration) for that contract.

**(i) Antitrust violations**

If the agency head considers that a bid or proposal evidences a violation of the antitrust laws, such agency head shall refer the bid or proposal to the Attorney General for appropriate action.

**(j) Planning for future competition**

(1)(A) In preparing a solicitation for the award of a development contract for a major system, the head of an agency shall consider requiring in the solicitation that an offeror include in its offer proposals described in subparagraph (B). In determining whether to require such proposals, the head of the agency shall give due consideration to the purposes for which the system is being procured and the technology necessary to meet the system's required capabilities. If such proposals are required, the head of the agency shall consider them in evaluating the offeror's price.

(B) The proposals that the head of an agency is to consider requiring in a solicitation for the award of a development contract are the following:

(i) Proposals to incorporate in the design of the major system items which are currently available within the supply system of the Federal agency responsible for the major system, available elsewhere in the national supply system, or commercially available from more than one source.

(ii) With respect to items that are likely to be required in substantial quantities during the system's service life, proposals to incorporate in the design of the major system items which the United States will be able to acquire competitively in the future.

(2)(A) In preparing a solicitation for the award of a production contract for a major system, the head of an agency shall consider requiring in the



solicitation that an offeror include in its offer proposals described in subparagraph (B). In determining whether to require such proposals, the head of the agency shall give due consideration to the purposes for which the system is being procured and the technology necessary to meet the system's required capabilities. If such proposals are required, the head of the agency shall consider them in evaluating the offeror's price.

(B) The proposals that the head of an agency is to consider requiring in a solicitation for the award of a production contract are proposals identifying opportunities to ensure that the United States will be able to obtain on a competitive basis items procured in connection with the system that are likely to be reprocurd in substantial quantities during the service life of the system. Proposals submitted in response to such requirement may include the following:

(i) Proposals to provide to the United States the right to use technical data to be provided under the contract for competitive reprourement of the item, together with the cost to the United States, if any, of acquiring such technical data and the right to use such data.

(ii) Proposals for the qualification or development of multiple sources of supply for the item.

(3) If the head of an agency is making a non-competitive award of a development contract or a production contract for a major system, the factors specified in paragraphs (1) and (2) to be considered in evaluating an offer for a contract may be considered as objectives in negotiating the contract to be awarded.

#### **(k) Protest file**

(1) If, in the case of a solicitation for a contract issued by, or an award or proposed award of a contract by, the head of an executive agency, a protest is filed pursuant to the procedures in subchapter V of chapter 35 of title 31, and an actual or prospective offeror so requests, a file of the protest shall be established by the procuring activity and reasonable access shall be provided to actual or prospective offerors.

(2) Information exempt from disclosure under section 552 of title 5 may be redacted in a file established pursuant to paragraph (1) unless an applicable protective order provides otherwise.

#### **(l) Agency actions on protests**

If, in connection with a protest, the head of an executive agency determines that a solicitation, proposed award, or award does not comply with the requirements of law or regulation, the head of such executive agency—

(1) may take any action set out in subparagraphs (A) through (F) of subsection (b)(1) of section 3554 of title 31; and

(2) may pay costs described in paragraph (1) of section 3554(c) of such title within the limits referred to in paragraph (2) of such section.

#### **(m) Prohibition on release of contractor proposals**

(1) Except as provided in paragraph (2), a proposal in the possession or control of an executive agency may not be made available to any person under section 552 of title 5.

(2) Paragraph (1) does not apply to any proposal that is set forth or incorporated by ref-

erence in a contract entered into between the agency and the contractor that submitted the proposal.

(3) In this subsection, the term “proposal” means any proposal, including a technical, management, or cost proposal, submitted by a contractor in response to the requirements of a solicitation for a competitive proposal.

(June 30, 1949, ch. 288, title III, §303B, as added Pub. L. 98-369, div. B, title VII, §2711(a)(2), July 18, 1984, 98 Stat. 1179; amended Pub. L. 98-577, title II, §201(a), Oct. 30, 1984, 98 Stat. 3068; Pub. L. 103-355, title I, §§1061(c), 1063-1066, Oct. 13, 1994, 108 Stat. 3267-3269; Pub. L. 104-106, div. D, title XLI, §§4103(b), 4104(b), div. E, title LVI, §5607(c), Feb. 10, 1996, 110 Stat. 644, 645, 701; Pub. L. 104-201, div. A, title VIII, §821(b), title X, §1074(b)(7), Sept. 23, 1996, 110 Stat. 2609, 2660.)

#### REFERENCES IN TEXT

The antitrust laws, referred to in subsec. (i), are classified generally to section 1 et seq. of Title 15, Commerce and Trade.

#### AMENDMENTS

1996—Subsec. (d)(2), (3). Pub. L. 104-106, §4103(b), added par. (2) and redesignated former par. (2) as (3).

Subsec. (e)(6). Pub. L. 104-106, §4104(b)(1), struck out par. (6) which read as follows: “The contracting officer shall include a summary of the debriefing in the contract file.”

Subsecs. (f) to (h). Pub. L. 104-106, §4104(b)(3), added subsecs. (f) to (h). Former subsecs. (f) to (h) redesignated (i) to (k), respectively.

Subsecs. (i), (j). Pub. L. 104-106, §4104(b)(2), redesignated subsecs. (f) and (g) as (i) and (j), respectively. Former subsec. (i) redesignated (l).

Subsec. (k). Pub. L. 104-106, §5607(c), as amended by Pub. L. 104-201, §1074(b)(7), struck out par. (3) which read as follows: “Regulations implementing this subsection shall be consistent with the regulations regarding the preparation and submission of an agency's protest file (the so-called ‘rule 4 file’) for protests to the General Services Board of Contract Appeals under section 759 of title 40.”

Pub. L. 104-106, §4104(b)(2), redesignated subsec. (h) as (k).

Subsec. (l). Pub. L. 104-106, §4104(b)(2), redesignated subsec. (i) as (l).

Subsec. (m). Pub. L. 104-201, §821(b), added subsec. (m).

1994—Subsec. (a). Pub. L. 103-355, §1061(c)(1), inserted “, and award a contract,” after “competitive proposals”.

Subsec. (c). Pub. L. 103-355, §§1061(c)(2), 1063(a), inserted “in accordance with subsection (a) of this section” after “shall evaluate the bids” in second sentence, substituted “transmitting, in writing or by electronic means, notice” for “transmitting written notice” in third sentence, and inserted at end “Within 3 days after the date of contract award, the executive agency shall notify, in writing or by electronic means, each bidder not awarded the contract that the contract has been awarded.”

Subsec. (d)(1). Pub. L. 103-355, §1061(c)(3)(A), added par. (1) and struck out former par. (1) which read as follows: “The executive agency shall evaluate competitive proposals and may award a contract—

“(A) after discussions conducted with the offerors at any time after receipt of the proposals and before the award of the contract; or

“(B) without discussions with the offerors (other than discussions conducted for the purpose of minor clarification) when it can be clearly demonstrated from the existence of full and open competition or accurate prior cost experience with the product or service that acceptance of an initial proposal without dis-

cussions would result in the lowest overall cost to the Government.”

Subsec. (d)(2). Pub. L. 103-355, §§1061(c)(3)(C), 1063(b), inserted “cost or” before “price” in first sentence, and, in second sentence, substituted “transmitting, in writing or by electronic means, notice” for “transmitting written notice” and “, within 3 days after the date of contract award, shall notify, in writing or by electronic means,” for “shall promptly notify”.

Pub. L. 103-355, §1061(c)(3)(B), redesignated par. (4) as (2) and struck out former par. (2) which read as follows: “In the case of award of a contract under paragraph (1)(A), the executive agency shall conduct, before such award, written or oral discussions with all responsible sources who submit proposals within the competitive range, considering only price and the other factors included in the solicitation.”

Subsec. (d)(3). Pub. L. 103-355, §1061(c)(3)(B), struck out par. (3) which read as follows: “In the case of award of a contract under paragraph (1)(B), the executive agency shall award the contract based on the proposals as received (and as clarified, if necessary, in discussions conducted for the purpose of minor clarification).”

Subsec. (d)(4). Pub. L. 103-355, §1061(c)(3)(B), redesignated par. (4) as (2).

Subsecs. (e) to (g). Pub. L. 103-355, §1064, added subsec. (e) and redesignated former subsecs. (e) and (f) as (f) and (g), respectively.

Subsec. (h). Pub. L. 103-355, §1065, added subsec. (h).

Subsec. (i). Pub. L. 103-355, §1066, added subsec. (i).

1984—Subsec. (f). Pub. L. 98-577 added subsec. (f).

#### EFFECTIVE DATE OF 1996 AMENDMENTS

Section 1074(b)(7) of Pub. L. 104-201 provided that the amendment made by that section is effective Feb. 10, 1996.

For effective date and applicability of amendment by sections 4103(b) and 4104(b) of Pub. L. 104-106, see section 4401 of Pub. L. 104-106, set out as a note under section 251 of this title.

Amendment by section 5607(c) of Pub. L. 104-106 effective 180 days after Feb. 10, 1996, see section 5701 of Pub. L. 104-106, set out as an Effective Date note under section 1401 of Title 40, Public Buildings, Property, and Works.

#### EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103-355, see section 10001 of Pub. L. 103-355, set out as a note under section 251 of this title.

#### EFFECTIVE DATE OF 1984 AMENDMENT

Section 201(b) of Pub. L. 98-577 provided that: “The amendment made by subsection (a) [amending this section] shall apply with respect to any solicitation issued more than 180 days after the date of enactment of this Act [Oct. 30, 1984].”

#### EFFECTIVE DATE

Section applicable with respect to any solicitation for bids or proposals issued after Mar. 31, 1985, see section 2751 of Pub. L. 98-369, set out as an Effective Date of 1984 Amendment note under section 251 of this title.

#### SMALL BUSINESS ACT

Section not to affect or supersede the provisions of section 637(a) of Title 15, Commerce and Trade, see section 2711(c) of Pub. L. 98-369, set out as a note under section 253 of this title.

#### EX. ORD. NO. 12979. AGENCY PROCUREMENT PROTESTS

Ex. Ord. No. 12979, Oct. 25, 1995, 60 F.R. 55171, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to ensure effective and efficient expenditure of public funds and fair and expeditious resolution of protests to the award of Federal procurement contracts, it is hereby ordered as follows:

SECTION 1. Heads of executive departments and agencies (“agencies”) engaged in the procurement of supplies and services shall prescribe administrative procedures for the resolution of protests to the award of their procurement contracts as an alternative to protests in fora outside the procuring agencies. Procedures prescribed pursuant to this order shall:

(a) emphasize that whenever conduct of a procurement is contested, all parties should use their best efforts to resolve the matter with agency contracting officers;

(b) to the maximum extent practicable, provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests, including, where appropriate and as permitted by law, the use of alternative dispute resolution techniques, third party neutrals, and another agency’s personnel;

(c) allow actual or prospective bidders or offerors whose direct economic interests would be affected by the award or failure to award the contract to request a review, at a level above the contracting officer, of any decision by a contracting officer that is alleged to have violated a statute or regulation and, thereby, caused prejudice to the protester; and

(d) except where immediate contract award or performance is justified for urgent and compelling reasons or is determined to be in the best interest of the United States, prohibit award or performance of the contract while a timely filed protest is pending before the agency. To allow for the withholding of a contract award or performance, the agency must have received notice of the protest within either 10 calendar days after the contract award or 5 calendar days after the bidder or offeror who is protesting the contract award was given the opportunity to be debriefed by the agency, whichever date is later.

SEC. 2. The Administrator for Federal Procurement Policy shall: (a) work with the heads of executive agencies to provide policy guidance and leadership necessary to implement provisions of this order; and

(b) review and evaluate agency experience and performance under this order, and report on any findings to the President within 2 years from the date of this order.

SEC. 3. The Administrator of General Services, the Secretary of Defense, and the Administrator of the National Aeronautics and Space Administration, in coordination with the Office of Federal Procurement Policy, shall amend the Federal Acquisition Regulation, 48 C.F.R. 1, within 180 days of the date of this order to further the purposes of this order.

WILLIAM J. CLINTON.

#### DEFINITIONS

The definitions in section 472 of Title 40, Public Buildings, Property, and Works, apply to this subchapter.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 253m, 257, 431 of this title; title 20 section 1018a.

### § 253c. Encouragement of new competition

#### (a) “Qualification requirement” defined

In this section, “qualification requirement” means a requirement for testing or other quality assurance demonstration that must be completed by an offeror before award of a contract.

#### (b) Agency head; functions; prior to enforcement of qualification requirement

Except as provided in subsection (c) of this section, the head of the agency shall, before enforcing any qualification requirement—

(1) prepare a written justification stating the necessity for establishing the qualification requirement and specify why the qualification

requirement must be demonstrated before contract award;

(2) specify in writing and make available to a potential offeror upon request all requirements which a prospective offeror, or its product, must satisfy in order to become qualified, such requirements to be limited to those least restrictive to meet the purposes necessitating the establishment of the qualification requirement;

(3) specify an estimate of the costs of testing and evaluation likely to be incurred by a potential offeror in order to become qualified;

(4) ensure that a potential offeror is provided, upon request, a prompt opportunity to demonstrate at its own expense (except as provided in subsection (d) of this section) its ability to meet the standards specified for qualification using qualified personnel and facilities of the agency concerned or of another agency obtained through interagency agreement, or under contract, or other methods approved by the agency (including use of approved testing and evaluation services not provided under contract to the agency);

(5) if testing and evaluation services are provided under contract to the agency for the purposes of clause (4), provide to the extent possible that such services be provided by a contractor who is not expected to benefit from an absence of additional qualified sources and who shall be required in such contract to adhere to any restriction on technical data asserted by the potential offeror seeking qualification; and

(6) ensure that a potential offeror seeking qualification is promptly informed as to whether qualification is attained and, in the event qualification is not attained, is promptly furnished specific information why qualification was not attained.

**(c) Applicability; waiver authority; referral of offers**

(1) Subsection (b) of this section does not apply with respect to a qualification requirement established by statute prior to October 30, 1984.

(2) Except as provided in paragraph (3), if it is unreasonable to specify the standards for qualification which a prospective offeror or its product must satisfy, a determination to that effect shall be submitted to the advocate for competition of the procuring activity responsible for the purchase of the item subject to the qualification requirement. After considering any comments of the advocate for competition reviewing such determination, the head of the procuring activity may waive the requirements of paragraphs (2) through (5) of subsection (b) of this section for up to two years with respect to the item subject to the qualification requirement.

(3) The waiver authority contained in paragraph (2) shall not apply with respect to any qualified products list.

(4) A potential offeror may not be denied the opportunity to submit and have considered an offer for a contract solely because the potential offeror has not been identified as meeting a qualification requirement, if the potential offeror can demonstrate to the satisfaction of the

contracting officer that the potential offeror or its product meets the standards established for qualification or can meet such standards before the date specified for award of the contract.

(5) Nothing contained in this subsection requires the referral of an offer to the Small Business Administration pursuant to section 637(b)(7) of title 15 if the basis for the referral is a challenge by the offeror to either the validity of the qualification requirement or the offeror's compliance with such requirement.

(6) The head of an agency need not delay a proposed procurement in order to comply with subsection (b) of this section or in order to provide a potential offeror with an opportunity to demonstrate its ability to meet the standards specified for qualification.

**(d) Number; qualified sources or products; fewer than two actual manufacturers; functions of agency head**

(1) If the number of qualified sources or qualified products available to compete actively for an anticipated future requirement is fewer than two actual manufacturers or the products of two actual manufacturers, respectively, the head of the agency concerned shall—

(A) periodically publish notice in the Commerce Business Daily soliciting additional sources or products to seek qualification, unless the contracting officer determines that such publication would compromise national security; and

(B) bear the cost of conducting the specified testing and evaluation (excluding the costs associated with producing the item or establishing the production, quality control, or other system to be tested and evaluated) for a small business concern or a product manufactured by a small business concern which has met the standards specified for qualification and which could reasonably be expected to compete for a contract for that requirement, but such costs may be borne only if the head of the agency determines that such additional qualified sources or products are likely to result in cost savings from increased competition for future requirements sufficient to offset (within a reasonable period of time considering the duration and dollar value of anticipated future requirements) the costs incurred by the agency.

(2) The head of an agency shall require a prospective contractor requesting the United States to bear testing and evaluation costs under paragraph (1)(B) to certify as to its status as a small business concern under section 632 of title 15.

**(e) Examination; need for qualification requirement**

Within seven years after the establishment of a qualification requirement, the need for such qualification requirement shall be examined and the standards of such requirement revalidated in accordance with the requirements of subsection (b) of this section. The preceding sentence does not apply in the case of a qualification requirement for which a waiver is in effect under subsection (c)(2) of this section.

**(f) Enforcement determination by agency head**

Except in an emergency as determined by the head of the agency, whenever the head of the

agency determines not to enforce a qualification requirement for a solicitation, the agency may not thereafter enforce that qualification requirement unless the agency complies with the requirements of subsection (b) of this section.

(June 30, 1949, ch. 288, title III, § 303C, formerly § 303D, as added Pub. L. 98-577, title II, § 202(a), Oct. 30, 1984, 98 Stat. 3069; renumbered § 303C, Pub. L. 99-145, title XIII, § 1304(c)(4)(A), Nov. 8, 1985, 99 Stat. 742.)

#### EFFECTIVE DATE

Section 202(b) of Pub. L. 98-577 provided that: “The amendment made by subsection (a) [enacting this section] shall apply with respect to solicitations issued more than 180 days after the date of enactment of this Act [Oct. 30, 1984].”

#### DEFINITIONS

The definitions in section 472 of Title 40, Public Buildings, Property, and Works, apply to this subchapter.

### § 253d. Validation of proprietary data restrictions

#### (a) Contracts; delivery of technical services; contents

A contract for property or services entered into by an executive agency which provides for the delivery of technical data, shall provide that—

(1) a contractor or subcontractor at any tier shall be prepared to furnish to the contracting officer a written justification for any restriction asserted by the contractor or subcontractor on the right of the United States to use such technical data; and

(2) the contracting officer may review the validity of any restriction asserted by the contractor or by a subcontractor under the contract on the right of the United States to use technical data furnished to the United States under the contract if the contracting officer determines that reasonable grounds exist to question the current validity of the asserted restriction and that the continued adherence to the asserted restriction by the United States would make it impracticable to procure the item competitively at a later time.

#### (b) Review; challenge; notice

If after such review the contracting officer determines that a challenge to the asserted restriction is warranted, the contracting officer shall provide written notice to the contractor or subcontractor asserting the restriction. Such notice shall state—

(1) the grounds for challenging the asserted restriction; and

(2) the requirement for a response within 60 days justifying the current validity of the asserted restriction.

#### (c) Written request; additional time; schedule of responses

If a contractor or subcontractor asserting a restriction subject to this section submits to the contracting officer a written request, showing the need for additional time to comply with the requirement to justify the current validity of the asserted restriction, additional time to ade-

quately permit the submission of such justification shall be provided by the contracting officer as appropriate. If a party asserting a restriction receives notices of challenges to restrictions on technical data from more than one contracting officer, and notifies each contracting officer of the existence of more than one challenge, the contracting officer initiating the first in time challenge, after consultation with the party asserting the restriction and the other contracting officers, shall formulate a schedule of responses to each of the challenges that will afford the party asserting the restriction with an equitable opportunity to respond to each such challenge.

#### (d) Decision; validity of asserted restriction; failure to submit response

(1) Upon a failure by the contractor or subcontractor to submit any response under subsection (b) of this section, the contracting officer shall issue a decision pertaining to the validity of the asserted restriction.

(2) If a justification is submitted in response to the notice provided pursuant to subsection (b) of this section, a contracting officer shall within 60 days of receipt of any justification submitted, issue a decision or notify the party asserting the restriction of the time within which a decision will be issued.

#### (e) Claim; considered claim within Contract Disputes Act of 1978

If a claim pertaining to the validity of the asserted restriction is submitted in writing to a contracting officer by a contractor or subcontractor at any tier, such claim shall be considered a claim within the meaning of the Contract Disputes Act of 1978 (41 U.S.C. 601 et seq.).

#### (f) Challenge; use of technical data; sustained; liability of United States for costs and fees

(1) If, upon final disposition, the contracting officer's challenge to the restriction on the right of the United States to use such technical data is sustained—

(A) the restriction on the right of the United States to use the technical data shall be cancelled; and

(B) if the asserted restriction is found not to be substantially justified, the contractor or subcontractor, as appropriate, shall be liable to the United States for payment of the cost to the United States of reviewing the asserted restriction and the fees and other expenses (as defined in section 2412(d)(2)(A) of title 28) incurred by the United States in challenging the asserted restriction, unless special circumstances would make such payment unjust.

(2) If, upon final disposition, the contracting officer's challenge to the restriction on the right of the United States to use such technical data is not sustained—

(A) the United States shall continue to be bound by the restriction; and

(B) the United States shall be liable for payment to the party asserting the restriction for fees and other expenses (as defined in section 2412(d)(2)(A) of title 28) incurred by the party asserting the restriction in defending the asserted restriction if the challenge by the United States is found not to be made in good faith.

(June 30, 1949, ch. 288, title III, §303D, formerly §303E, as added Pub. L. 98-577, title II, §203(a), Oct. 30, 1984, 98 Stat. 3071; renumbered §303D, Pub. L. 95-145, title XIII, §1304(c)(4)(A), Nov. 8, 1985, 99 Stat. 742.)

#### REFERENCES IN TEXT

The Contract Disputes Act of 1978, referred to in subsec. (e), is Pub. L. 95-563, Nov. 1, 1978, 92 Stat. 2383, as amended, which is classified principally to chapter 9 (§601 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 601 of this title and Tables.

#### EFFECTIVE DATE

Section 203(b) of Pub. L. 98-577 provided that: “The amendment made by subsection (a) [enacting this section] shall apply with respect to solicitations issued more than 60 days after the date of the enactment of this Act [Oct. 30, 1984].”

#### DEFINITIONS

The definitions in section 472 of Title 40, Public Buildings, Property, and Works, apply to this subchapter.

### **§ 253e. Repealed. Pub. L. 103-355, title I, §1252, Oct. 13, 1994, 108 Stat. 3284**

Section, act June 30, 1949, ch. 288, title III, §303E, formerly §303F, as added Oct. 30, 1984, Pub. L. 98-577, title II, §204(a), 98 Stat. 3072; renumbered §303E, Nov. 8, 1985, Pub. L. 99-145, title XIII, §1304(c)(4)(A), 99 Stat. 742, related to commercial pricing for supplies.

#### EFFECTIVE DATE OF REPEAL

For effective date and applicability of repeal, see section 10001 of Pub. L. 103-355, set out as an Effective Date of 1994 Amendment note under section 251 of this title.

### **§ 253f. Economic order qualities**

#### **(a) Procurement of supplies; costs advantageous to United States**

Each executive agency shall procure supplies in such quantity as (A) will result in the total cost and unit cost most advantageous to the United States, where practicable, and (B) does not exceed the quantity reasonably expected to be required by the agency.

#### **(b) Opinions; economic advantage to United States**

Each solicitation for a contract for supplies shall, if practicable, include a provision inviting each offeror responding to the solicitation to state an opinion on whether the quantity of the supplies proposed to be procured is economically advantageous to the United States and, if applicable, to recommend a quantity or quantities which would be more economically advantageous to the United States. Each such recommendation shall include a quotation of the total price and the unit price for supplies procured in each recommended quantity.

(June 30, 1949, ch. 288, title III, §303F, formerly §303G, as added Pub. L. 98-577, title II, §205(a), Oct. 30, 1984, 98 Stat. 3073; renumbered §303F, Pub. L. 99-145, title XIII, §1304(c)(4)(A), Nov. 8, 1985, 99 Stat. 742.)

#### EFFECTIVE DATE

Section 205(b) of Pub. L. 98-577 provided that: “The amendment made by subsection (a) [enacting this sec-

tion] shall take effect at the end of the 180-day period beginning on the date of the enactment of this Act [Oct. 30, 1984].”

#### DEFINITIONS

The definitions in section 472 of Title 40, Public Buildings, Property, and Works, apply to this subchapter.

### **§ 253g. Prohibition of contractors limiting subcontractor sales directly to United States**

#### **(a) Contract restrictions**

Each contract for the purchase of property or services made by an executive agency shall provide that the contractor will not—

(1) enter into any agreement with a subcontractor under the contract that has the effect of unreasonably restricting sales by the subcontractor directly to the United States of any item or process (including computer software) made or furnished by the subcontractor under the contract (or any follow-on production contract); or

(2) otherwise act to restrict unreasonably the ability of a subcontractor to make sales to the United States described in clause (1).

#### **(b) Rights under law**

This section does not prohibit a contractor from asserting rights it otherwise has under law.

#### **(c) Inapplicability to certain contracts**

This section does not apply to a contract for an amount that is not greater than the simplified acquisition threshold.

#### **(d) Inapplicability when Government treated similarly to other purchasers**

An agreement between the contractor in a contract for the acquisition of commercial items and a subcontractor under such contract that restricts sales by such subcontractor directly to persons other than the contractor may not be considered to unreasonably restrict sales by that subcontractor to the United States in violation of the provision included in such contract pursuant to subsection (a) of this section if the agreement does not result in the Federal Government being treated differently with regard to the restriction than any other prospective purchaser of such commercial items from that subcontractor.

(June 30, 1949, ch. 288, title III, §303G, formerly §303H, as added Pub. L. 98-577, title II, §206(a), Oct. 30, 1984, 98 Stat. 3073; renumbered §303G, Pub. L. 99-145, title XIII, §1304(c)(4)(A), Nov. 8, 1985, 99 Stat. 742; amended Pub. L. 103-355, title IV, §4103(b), title VIII, §8204(a), Oct. 13, 1994, 108 Stat. 3341, 3396.)

#### AMENDMENTS

1994—Subsec. (c). Pub. L. 103-355, §4103(b), added subsec. (c).

Subsec. (d). Pub. L. 103-355, §8204(a), added subsec. (d).

#### EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103-355, see section 10001 of Pub. L. 103-355, set out as a note under section 251 of this title.

#### EFFECTIVE DATE

Section 206(b) of Pub. L. 98-577 provided that: “The amendment made by subsection (a) [enacting this sec-

tion] shall apply with respect to solicitations made more than 180 days after the date of enactment of this Act [Oct. 30, 1984].”

#### DEFINITIONS

The definitions in section 472 of Title 40, Public Buildings, Property, and Works, apply to this subchapter.

### § 253h. Task and delivery order contracts: general authority

#### (a) Authority to award

Subject to the requirements of this section, section 253j of this title, and other applicable law, the head of an executive agency may enter into a task or delivery order contract (as defined in section 253k of this title) for procurement of services or property.

#### (b) Solicitation

The solicitation for a task or delivery order contract shall include the following:

(1) The period of the contract, including the number of options to extend the contract and the period for which the contract may be extended under each option, if any.

(2) The maximum quantity or dollar value of the services or property to be procured under the contract.

(3) A statement of work, specifications, or other description that reasonably describes the general scope, nature, complexity, and purposes of the services or property to be procured under the contract.

#### (c) Applicability of restriction on use of non-competitive procedures

The head of an executive agency may use procedures other than competitive procedures to enter into a task or delivery order contract under this section only if an exception in subsection (c) of section 253 of this title applies to the contract and the use of such procedures is approved in accordance with subsection (f) of such section.

#### (d) Single and multiple contract awards

(1) The head of an executive agency may exercise the authority provided in this section—

(A) to award a single task or delivery order contract; or

(B) if the solicitation states that the head of the executive agency has the option to do so, to award separate task or delivery order contracts for the same or similar services or property to two or more sources.

(2) No determination under section 253(b) of this title is required for an award of multiple task or delivery order contracts under paragraph (1)(B).

(3) The regulations implementing this subsection shall—

(A) establish a preference for awarding, to the maximum extent practicable, multiple task or delivery order contracts for the same or similar services or property under the authority of paragraph (1)(B); and

(B) establish criteria for determining when award of multiple task or delivery order contracts would not be in the best interest of the Federal Government.

#### (e) Contract modifications

A task or delivery order may not increase the scope, period, or maximum value of the task or

delivery order contract under which the order is issued. The scope, period, or maximum value of the contract may be increased only by modification of the contract.

#### (f) Inapplicability to contracts for advisory and assistance services

Except as otherwise specifically provided in section 253i of this title, this section does not apply to a task or delivery order contract for the acquisition of advisory and assistance services (as defined in section 1105(g) of title 31).

#### (g) Relationship to other contracting authority

Nothing in this section may be construed to limit or expand any authority of the head of an executive agency or the Administrator of General Services to enter into schedule, multiple award, or task or delivery order contracts under any other provision of law.

(June 30, 1949, ch. 288, title III, §303H, as added Pub. L. 103-355, title I, §1054(a), Oct. 13, 1994, 108 Stat. 3261.)

#### EFFECTIVE DATE

For effective date and applicability of section, see section 10001 of Pub. L. 103-355, set out as an Effective Date of 1994 Amendment note under section 251 of this title.

#### CONSTRUCTION

Section 1054(b) of Pub. L. 103-355 provided that: “Nothing in section 303H, 303I, 303J, or 303K of the Federal Property and Administrative Services Act of 1949 [41 U.S.C. 253h, 253i, 253j, 253k], as added by subsection (a), shall be construed as modifying or superseding, or as intended to impair or restrict, authorities or responsibilities under—

“(1) the Brooks Automatic Data Processing Act (section 111 of the Federal Property and Administrative Services Act of 1949 [former] 40 U.S.C. 759); and

“(2) the Brooks Architect-Engineers Act (title IX of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 541 et seq.)).”

#### GUIDANCE ON USE OF TASK ORDER AND DELIVERY ORDER CONTRACTS

Pub. L. 106-65, div. A, title VIII, §804, Oct. 5, 1999, 113 Stat. 704, provided that:

“(a) GUIDANCE IN THE FEDERAL ACQUISITION REGULATION.—Not later than 180 days after the date of the enactment of this Act [Oct. 5, 1999], the Federal Acquisition Regulation issued in accordance with sections 6 and 25 of the Office of Federal Procurement Policy Act (41 U.S.C. 405 and 421) shall be revised to provide guidance to agencies on the appropriate use of task order and delivery order contracts in accordance with sections 2304a through 2304d of title 10, United States Code, and sections 303H through 303K of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253h through 253k).

“(b) CONTENT OF GUIDANCE.—The regulations issued pursuant to subsection (a) shall, at a minimum, provide the following:

“(1) Specific guidance on the appropriate use of governmentwide and other multiagency contracts entered into in accordance with the provisions of law referred to in that subsection.

“(2) Specific guidance on steps that agencies should take in entering into and administering multiple award task order and delivery order contracts to ensure compliance with—

“(A) the requirement in section 5122 of the Clinger-Cohen Act (40 U.S.C. 1422) for capital planning and investment control in purchases of information technology products and services;

“(B) the requirement in section 2304c(b) of title 10, United States Code, and section 303J(b) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253j(b)) to ensure that all contractors are afforded a fair opportunity to be considered for the award of task orders and delivery orders; and

“(C) the requirement in section 2304c(c) of title 10, United States Code, and section 303J(c) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253j(c)) for a statement of work in each task order or delivery order issued that clearly specifies all tasks to be performed or property to be delivered under the order.

“(c) GSA FEDERAL SUPPLY SCHEDULES PROGRAM.—The Administrator for Federal Procurement Policy shall consult with the Administrator of General Services to assess the effectiveness of the multiple awards schedule program of the General Services Administration referred to in section 309(b)(3) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 259(b)(3)) that is administered as the Federal Supply Schedules program. The assessment shall include examination of the following:

“(1) The administration of the program by the Administrator of General Services.

“(2) The ordering and program practices followed by Federal customer agencies in using schedules established under the program.

“(d) GAO REPORT.—Not later than one year after the date on which the regulations required by subsection (a) are published in the Federal Register, the Comptroller General shall submit to Congress an evaluation of—

“(1) executive agency compliance with the regulations; and

“(2) conformance of the regulations with existing law, together with any recommendations that the Comptroller General considers appropriate.”

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 253i, 253j, 253k of this title.

### § 253i. Task order contracts: advisory and assistance services

#### (a) Authority to award

(1) Subject to the requirements of this section, section 253j of this title, and other applicable law, the head of an executive agency may enter into a task order contract (as defined in section 253k of this title) for procurement of advisory and assistance services.

(2) The head of an executive agency may enter into a task order contract for advisory and assistance services only under the authority of this section.

#### (b) Limitation on contract period

The period of a task order contract entered into under this section, including all periods of extensions of the contract under options, modifications, or otherwise, may not exceed five years unless a longer period is specifically authorized in a law that is applicable to such contract.

#### (c) Content of notice

The notice required by section 416 of this title and section 637(e) of title 15 shall reasonably and fairly describe the general scope, magnitude, and duration of the proposed task order contract in a manner that would reasonably enable a potential offeror to decide whether to request the solicitation and consider submitting an offer.

#### (d) Required content of solicitation and contract

(1) The solicitation shall include the information (regarding services) described in section 253h(b) of this title.

(2) A task order contract entered into under this section shall contain the same information that is required by paragraph (1) to be included in the solicitation of offers for that contract.

#### (e) Multiple awards

(1) The head of an executive agency may, on the basis of one solicitation, award separate task order contracts under this section for the same or similar services to two or more sources if the solicitation states that the head of the executive agency has the option to do so.

(2) If, in the case of a task order contract for advisory and assistance services to be entered into under the authority of this section, the contract period is to exceed three years and the contract amount is estimated to exceed \$10,000,000 (including all options), the solicitation shall—

(A) provide for a multiple award authorized under paragraph (1); and

(B) include a statement that the head of the executive agency may also elect to award only one task order contract if the head of the executive agency determines in writing that only one of the offerors is capable of providing the services required at the level of quality required.

(3) Paragraph (2) does not apply in the case of a solicitation for which the head of the executive agency concerned determines in writing that, because the services required under the contract are unique or highly specialized, it is not practicable to award more than one contract.

#### (f) Contract modifications

(1) A task order may not increase the scope, period, or maximum value of the task order contract under which the order is issued. The scope, period, or maximum value of the contract may be increased only by modification of the contract.

(2) Unless use of procedures other than competitive procedures is authorized by an exception in subsection (c) of section 253 of this title and approved in accordance with subsection (f) of such section, competitive procedures shall be used for making such a modification.

(3) Notice regarding the modification shall be provided in accordance with section 416 of this title and section 637(e) of title 15.

#### (g) Contract extensions

(1) Notwithstanding the limitation on the contract period set forth in subsection (b) of this section or in a solicitation or contract pursuant to subsection (e) of this section, a contract entered into by the head of an executive agency under this section may be extended on a sole-source basis for a period not exceeding six months if the head of such executive agency determines that—

(A) the award of a follow-on contract has been delayed by circumstances that were not reasonably foreseeable at the time the initial contract was entered into; and

(B) the extension is necessary in order to ensure continuity of the receipt of services pending the award of, and commencement of performance under, the follow-on contract.

(2) A task order contract may be extended under the authority of paragraph (1) only once and only in accordance with the limitations and requirements of this subsection.

**(h) Inapplicability to certain contracts**

This section does not apply to a contract for the acquisition of property or services that includes acquisition of advisory and assistance services if the head of the executive agency entering into such contract determines that, under the contract, advisory and assistance services are necessarily incident to, and not a significant component of, the contract.

**(i) “Advisory and assistance services” defined**

In this section, the term “advisory and assistance services” has the meaning given such term in section 1105(g) of title 31.

(June 30, 1949, ch. 288, title III, §303I, as added Pub. L. 103-355, title I, §1054(a), Oct. 13, 1994, 108 Stat. 3262.)

**EFFECTIVE DATE**

For effective date and applicability of section, see section 10001 of Pub. L. 103-355, set out as an Effective Date of 1994 Amendment note under section 251 of this title.

**CONSTRUCTION**

Section not to be construed as modifying or superseding, or as intended to impair or restrict, authorities or responsibilities under former section 759 of Title 40, Public Buildings, Property, and Works, or subchapter VI (§541 et seq.) of chapter 10 of Title 40, see section 1054(b) of Pub. L. 103-355, set out as a note under section 253h of this title.

**SECTION REFERRED TO IN OTHER SECTIONS**

This section is referred to in sections 253h, 253j, 253k of this title.

**§ 253j. Task and delivery order contracts: orders**

**(a) Issuance of orders**

The following actions are not required for issuance of a task or delivery order under a task or delivery order contract:

(1) A separate notice for such order under section 416 of this title or section 637(e) of title 15.

(2) Except as provided in subsection (b) of this section, a competition (or a waiver of competition approved in accordance with section 253(f) of this title) that is separate from that used for entering into the contract.

**(b) Multiple award contracts**

When multiple contracts are awarded under section 253h(d)(1)(B) or 253i(e) of this title, all contractors awarded such contracts shall be provided a fair opportunity to be considered, pursuant to procedures set forth in the contracts, for each task or delivery order in excess of \$2,500 that is to be issued under any of the contracts unless—

(1) the executive agency’s need for the services or property ordered is of such unusual urgency that providing such opportunity to all

such contractors would result in unacceptable delays in fulfilling that need;

(2) only one such contractor is capable of providing the services or property required at the level of quality required because the services or property ordered are unique or highly specialized;

(3) the task or delivery order should be issued on a sole-source basis in the interest of economy and efficiency because it is a logical follow-on to a task or delivery order already issued on a competitive basis; or

(4) it is necessary to place the order with a particular contractor in order to satisfy a minimum guarantee.

**(c) Statement of work**

A task or delivery order shall include a statement of work that clearly specifies all tasks to be performed or property to be delivered under the order.

**(d) Protests**

A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued.

**(e) Task and delivery order ombudsman**

The head of each executive agency who awards multiple task or delivery order contracts pursuant to section 253h(d)(1)(B) or 253i(e) of this title shall appoint or designate a task and delivery order ombudsman who shall be responsible for reviewing complaints from the contractors on such contracts and ensuring that all of the contractors are afforded a fair opportunity to be considered for task or delivery orders when required under subsection (b) of this section. The task and delivery order ombudsman shall be a senior agency official who is independent of the contracting officer for the contracts and may be the executive agency’s competition advocate.

**(f) Applicability**

This section applies to task and delivery order contracts entered into under sections 253h and 253i of this title.

(June 30, 1949, ch. 288, title III, §303J, as added Pub. L. 103-355, title I, §1054(a), Oct. 13, 1994, 108 Stat. 3264.)

**EFFECTIVE DATE**

For effective date and applicability of section, see section 10001 of Pub. L. 103-355, set out as an Effective Date of 1994 Amendment note under section 251 of this title.

**CONSTRUCTION**

Section not to be construed as modifying or superseding, or as intended to impair or restrict, authorities or responsibilities under former section 759 of Title 40, Public Buildings, Property, and Works, or subchapter VI (§541 et seq.) of chapter 10 of Title 40, see section 1054(b) of Pub. L. 103-355, set out as a note under section 253h of this title.

**SECTION REFERRED TO IN OTHER SECTIONS**

This section is referred to in sections 253h, 253i, 253k of this title.

**§ 253k. Task and delivery order contracts: definitions**

In sections 253h, 253i, and 253j of this title:



(1) The term “task order contract” means a contract for services that does not procure or specify a firm quantity of services (other than a minimum or maximum quantity) and that provides for the issuance of orders for the performance of tasks during the period of the contract.

(2) The term “delivery order contract” means a contract for property that does not procure or specify a firm quantity of property (other than a minimum or maximum quantity) and that provides for the issuance of orders for the delivery of property during the period of the contract.

(June 30, 1949, ch. 288, title III, §303K, as added Pub. L. 103-355, title I, §1054(a), Oct. 13, 1994, 108 Stat. 3265.)

#### EFFECTIVE DATE

For effective date and applicability of section, see section 10001 of Pub. L. 103-355, set out as an Effective Date of 1994 Amendment note under section 251 of this title.

#### CONSTRUCTION

Section not to be construed as modifying or superseding, or as intended to impair or restrict, authorities or responsibilities under former section 759 of Title 40, Public Buildings, Property, and Works, or subchapter VI (§541 et seq.) of chapter 10 of Title 40, see section 1054(b) of Pub. L. 103-355, set out as a note under section 253h of this title.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 253h, 253i of this title.

### § 253I. Severable services contracts for periods crossing fiscal years

#### (a) Authority

The head of an executive agency may enter into a contract for procurement of severable services for a period that begins in one fiscal year and ends in the next fiscal year if (without regard to any option to extend the period of the contract) the contract period does not exceed one year.

#### (b) Obligation of funds

Funds made available for a fiscal year may be obligated for the total amount of a contract entered into under the authority of subsection (a) of this section.

(June 30, 1949, ch. 288, title III, §303L, as added Pub. L. 103-355, title I, §1073, Oct. 13, 1994, 108 Stat. 3271; amended Pub. L. 104-106, div. D, title XLIII, §4321(a)(1), Feb. 10, 1996, 110 Stat. 671.)

#### AMENDMENTS

1996—Pub. L. 104-106 made technical correction to directory language of Pub. L. 103-355, §1073, which enacted this section.

#### EFFECTIVE DATE OF 1996 AMENDMENT

Section 4321(a) of Pub. L. 104-106 provided that the amendment made by that section is effective as of Oct. 13, 1994, and as if included in Pub. L. 103-355.

#### EFFECTIVE DATE

For effective date and applicability of section, see section 10001 of Pub. L. 103-355, set out as an Effective Date of 1994 Amendment note under section 251 of this title.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 253I-1, 253I-2, 253I-3, 253I-4 of this title.

### § 253I-1. Contract authority of Comptroller General

The Comptroller General may use available funds, now and hereafter, to enter into contracts for the acquisition of severable services for a period that begins in one fiscal year and ends in the next fiscal year and to enter in multiyear contracts for the acquisition of property and nonaudit-related services, to the same extent as executive agencies under the authority of sections 253I and 254c, respectively, of this title.

(Pub. L. 105-18, title II, §7004, June 12, 1997, 111 Stat. 192.)

#### CODIFICATION

Section was not enacted as part of title III of act June 30, 1949, ch. 288, 63 Stat. 393, which comprises this subchapter.

### § 253I-2. Contract authority of Library of Congress

The Library of Congress may use available funds, now and hereafter, to enter into contracts for the lease or acquisition of severable services for a period that begins in one fiscal year and ends in the next fiscal year and to enter into multi-year contracts for the acquisition of property and services pursuant to sections 253I and 254c of this title, respectively.

(Pub. L. 106-57, title II, §207, Sept. 29, 1999, 113 Stat. 423.)

#### CODIFICATION

Section was not enacted as part of title III of act June 30, 1949, ch. 288, 63 Stat. 393, which comprises this subchapter.

### § 253I-3. Contract authority of Chief Administrative Officer of the House of Representatives

During fiscal year 2001 and any succeeding fiscal year, the Chief Administrative Officer of the House of Representatives may—

(1) enter into contracts for the acquisition of severable services for a period that begins in 1 fiscal year and ends in the next fiscal year to the same extent as the head of an executive agency under the authority of section 253I of this title; and

(2) enter into multiyear contracts for the acquisitions of property and nonaudit-related services to the same extent as executive agencies under the authority of section 254c of this title.

(Pub. L. 106-554, §1(a)(2) [title I, §101], Dec. 21, 2000, 114 Stat. 2763, 2763A-100.)

#### CODIFICATION

Section was not enacted as part of title III of act June 30, 1949, ch. 288, 63 Stat. 393, which comprises this subchapter.

### § 253I-4. Contract authority of Congressional Budget Office

Beginning on December 21, 2000, and hereafter, the Congressional Budget Office may use avail-

able funds to enter into contracts for the procurement of severable services for a period that begins in one fiscal year and ends in the next fiscal year and may enter into multi-year contracts for the acquisition of property and services, to the same extent as executive agencies under the authority of section<sup>1</sup> 253l and 254c, respectively, of this title.

(Pub. L. 106-554, §1(a)(2) [title I, §110], Dec. 21, 2000, 114 Stat. 2763, 2763A-108.)

#### CODIFICATION

Section was not enacted as part of title III of act June 30, 1949, ch. 288, 63 Stat. 393, which comprises this subchapter.

### § 253m. Design-build selection procedures

#### (a) Authorization

Unless the traditional acquisition approach of design-bid-build established under the Brooks Architect-Engineers Act (title IX of this Act) [40 U.S.C. 541 et seq.] is used or another acquisition procedure authorized by law is used, the head of an executive agency shall use the two-phase selection procedures authorized in this section for entering into a contract for the design and construction of a public building, facility, or work when a determination is made under subsection (b) of this section that the procedures are appropriate for use.

#### (b) Criteria for use

A contracting officer shall make a determination whether two-phase selection procedures are appropriate for use for entering into a contract for the design and construction of a public building, facility, or work when the contracting officer anticipates that three or more offers will be received for such contract, design work must be performed before an offeror can develop a price or cost proposal for such contract, the offeror will incur a substantial amount of expense in preparing the offer, and the contracting officer has considered information such as the following:

- (1) The extent to which the project requirements have been adequately defined.
- (2) The time constraints for delivery of the project.
- (3) The capability and experience of potential contractors.
- (4) The suitability of the project for use of the two-phase selection procedures.
- (5) The capability of the agency to manage the two-phase selection process.
- (6) Other criteria established by the agency.

#### (c) Procedures described

Two-phase selection procedures consist of the following:

- (1) The agency develops, either in-house or by contract, a scope of work statement for inclusion in the solicitation that defines the project and provides prospective offerors with sufficient information regarding the Government's requirements (which may include criteria and preliminary design, budget parameters, and schedule or delivery requirements) to enable the offerors to submit proposals

which meet the Government's needs. If the agency contracts for development of the scope of work statement, the agency shall contract for architectural and engineering services as defined by and in accordance with the Brooks Architect-Engineers Act (40 U.S.C. 541 et seq.).

(2) The contracting officer solicits phase-one proposals that—

- (A) include information on the offeror's—
  - (i) technical approach; and
  - (ii) technical qualifications; and
- (B) do not include—
  - (i) detailed design information; or
  - (ii) cost or price information.

(3) The evaluation factors to be used in evaluating phase-one proposals are stated in the solicitation and include specialized experience and technical competence, capability to perform, past performance of the offeror's team (including the architect-engineer and construction members of the team) and other appropriate factors, except that cost-related or price-related evaluation factors are not permitted. Each solicitation establishes the relative importance assigned to the evaluation factors and subfactors that must be considered in the evaluation of phase-one proposals. The agency evaluates phase-one proposals on the basis of the phase-one evaluation factors set forth in the solicitation.

(4) The contracting officer selects as the most highly qualified the number of offerors specified in the solicitation to provide the property or services under the contract and requests the selected offerors to submit phase-two competitive proposals that include technical proposals and cost or price information. Each solicitation establishes with respect to phase two—

- (A) the technical submission for the proposal, including design concepts or proposed solutions to requirements addressed within the scope of work (or both), and
- (B) the evaluation factors and subfactors, including cost or price, that must be considered in the evaluations of proposals in accordance with subsections (b), (c), and (d) of section 253a of this title.

The contracting officer separately evaluates the submissions described in subparagraphs (A) and (B).

(5) The agency awards the contract in accordance with section 253b of this title.

#### (d) Solicitation to state number of offerors to be selected for phase-two requests for competitive proposals

A solicitation issued pursuant to the procedures described in subsection (c) of this section shall state the maximum number of offerors that are to be selected to submit competitive proposals pursuant to subsection (c)(4) of this section. The maximum number specified in the solicitation shall not exceed 5 unless the agency determines with respect to an individual solicitation that a specified number greater than 5 is in the Government's interest and is consistent with the purposes and objectives of the two-phase selection process.

<sup>1</sup> So in original. Probably should be "sections".

**(e) Requirement for guidance and regulations**

The Federal Acquisition Regulation shall include guidance—

(1) regarding the factors that may be considered in determining whether the two-phase contracting procedures authorized by subsection (a) of this section are appropriate for use in individual contracting situations;

(2) regarding the factors that may be used in selecting contractors; and

(3) providing for a uniform approach to be used Government-wide.

(June 30, 1949, ch. 288, title III, §303M, as added Pub. L. 104-106, div. D, title XLI, §4105(b)(1), Feb. 10, 1996, 110 Stat. 647.)

## REFERENCES IN TEXT

The Brooks Architect-Engineers Act, referred to in subsecs. (a) and (c)(1), is title IX of act June 30, 1949, ch. 288, as added by act Oct. 27, 1972, Pub. L. 92-582, 86 Stat. 1278, as amended, which is classified generally to subchapter VI (§541 et seq.) of chapter 10 of Title 40, Public Buildings, Property, and Works. For complete classification of this Act to the Code, see Short Title note set out under section 541 of Title 40 and Tables.

## EFFECTIVE DATE

For effective date and applicability of section, see section 4401 of Pub. L. 104-106, set out as an Effective Date of 1996 Amendment note under section 251 of this title.

**§ 254. Contract requirements****(a) Contracts awarded using procedures other than sealed-bid procedures**

Except as provided in subsection (b) of this section, contracts awarded after using procedures other than sealed-bid procedures may be of any type which in the opinion of the agency head will promote the best interests of the Government. Every contract awarded after using procedures other than sealed-bid procedures shall contain a suitable warranty, as determined by the agency head, by the contractor that no person or selling agency has been employed or retained to solicit or secure such contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business, for the breach or violation of which warranty the Government shall have the right to annul such contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee. The preceding sentence does not apply to a contract for an amount that is not greater than the simplified acquisition threshold or to a contract for the acquisition of commercial items.

**(b) Barred contracts; fee limitation; determination of use; advance notification**

The cost-plus-a-percentage-of-cost system of contracting shall not be used, and in the case of a cost-plus-a-fixed-fee contract the fee shall not exceed 10 percent of the estimated cost of the contract, exclusive of the fee, as determined by the agency head at the time of entering into

such contract (except that a fee not in excess of 15 percent of such estimated cost is authorized in any such contract for experimental, developmental, or research work and that a fee inclusive of the contractor's costs and not in excess of 6 percent of the estimated cost, exclusive of fees, as determined by the agency head at the time of entering into the contract, of the project to which such fee is applicable is authorized in contracts for architectural or engineering services relating to any public works or utility project). All cost and cost-plus-a-fixed-fee contracts shall provide for advance notification by the contractor to the procuring agency of any subcontract thereunder on a cost-plus-a-fixed-fee basis and of any fixed-price subcontract or purchase order which exceeds in dollar amount either the simplified acquisition threshold or 5 percent of the total estimated cost of the prime contract; and a procuring agency, through any authorized representative thereof, shall have the right to inspect the plans and to audit the books and records of any prime contractor or subcontractor engaged in the performance of a cost or cost-plus-a-fixed-fee contract.

(June 30, 1949, ch. 288, title III, §304, 63 Stat. 395; Oct. 31, 1951, ch. 652, 65 Stat. 700; July 12, 1952, ch. 703, §1(m), 66 Stat. 594; Pub. L. 89-607, §2, Sept. 27, 1966, 80 Stat. 850; Pub. L. 98-369, div. B, title VII, §§2712, 2714(a)(3), July 18, 1984, 98 Stat. 1181, 1184; Pub. L. 103-355, title I, §§1071, 1251(a)(1), title II, §2251(b), title IV, §§4103(c), 4402(c), title VIII, §8204(b), title X, §10005(e), Oct. 13, 1994, 108 Stat. 3270, 3278, 3320, 3341, 3349, 3396, 3408.)

## AMENDMENTS

1994—Subsec. (a). Pub. L. 103-355, §§4103(c), 8204(b), inserted at end “The preceding sentence does not apply to a contract for an amount that is not greater than the simplified acquisition threshold or to a contract for the acquisition of commercial items.”

Subsec. (b). Pub. L. 103-355, §§4402(c), 10005(e), substituted “percent” for “per centum” wherever appearing and “either the simplified acquisition threshold” for “either \$25,000” in last sentence.

Pub. L. 103-355, §1071, struck out after first sentence “Neither a cost nor a cost-plus-a-fixed-fee contract nor an incentive-type contract shall be used unless the agency head determines that such method of contracting is likely to be less costly than other methods or that it is impractical to secure property or services of the kind or quality required without the use of a cost or cost-plus-a-fixed-fee contract or an incentive-type contract.”

Subsec. (c). Pub. L. 103-355, §2251(b), struck out subsec. (c) which related to examination of books, records, etc. of contractors, time limitations, exemptions, exceptional conditions, and reports to Congress. See section 254d of this title.

Subsec. (d). Pub. L. 103-355, §1251(a)(1), struck out subsec. (d) which related to submission of cost or pricing data by contractors and subcontractors, certificate requirements, adjustment of price, inspection of books, records, etc., necessity of data, and exceptions. See section 254b of this title.

1984—Pub. L. 98-369, §2714(a)(2), substituted “Contract requirements” for “Negotiated contracts” in section catchline.

Subsec. (a). Pub. L. 98-369, §2714(a)(3), substituted “awarded after using procedures other than sealed-bid procedures” for “negotiated pursuant to section 252(c) of this title” in first and second sentences.

Subsec. (c). Pub. L. 98-369, §2714(a)(3)(C), substituted “awarded after using procedures other than sealed-bid

procedures” for “negotiated without advertising pursuant to authority contained in this Act” in first sentence.

Subsec. (d). Pub. L. 98-369, §2712, added subsec. (d).

1966—Subsec. (c). Pub. L. 89-607 provided for exemption of certain contracts with foreign contractors from the requirement for an examination-of-records clause, such determination to be reported to Congress.

1952—Subsec. (b). Act July 12, 1952, substituted “property” for “supplies”.

1951—Subsec. (c). Act Oct. 31, 1951, added subsec. (c).

#### EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103-355, see section 10001 of Pub. L. 103-355, set out as a note under section 251 of this title.

#### EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-369 applicable with respect to any solicitation for bids or proposals issued after Mar. 31, 1985, see section 2751 of Pub. L. 98-369, set out as a note under section 251 of this title.

#### EFFECTIVE DATE

Section effective July 1, 1949, see section 605 of act June 30, 1949, set out as a note under section 471 of Title 40, Public Buildings, Property, and Works.

#### EXEMPTION OF FUNCTIONS

Functions authorized by Foreign Assistance Act of 1961, as amended, as exempt, see Ex. Ord. No. 11223, eff. May 12, 1965, 30 F.R. 6635, set out as a note under section 2393 of Title 22, Foreign Relations and Intercourse.

#### FOREIGN CONTRACTORS

Secretaries of Defense, Army, Navy, or Air Force, or their designees, to determine, prior to exercising the authority provided in the amendment of this section by Pub. L. 89-607 to exempt certain contracts with foreign contractors from the requirement of an examination-of-records clause, that all reasonable efforts have been made to include such examination-of-records clause, as required by par. (11) of Part I of Ex. Ord. No. 10789, and that alternate sources of supply are not reasonably available, see par. (11) of Part I of Ex. Ord. No. 10789, eff. Nov. 14, 1958, 23 F.R. 8897, as amended, set out as a note under section 1431 of Title 50, War and National Defense.

#### EXECUTIVE ORDER No. 12800

Ex. Ord. No. 12800, Apr. 13, 1992, 57 F.R. 12985, 13413, which required Federal contractors to post a notice that employees could not be required to be members of a union in order to retain their jobs, was revoked by Ex. Ord. No. 12836, §1, Feb. 1, 1993, 58 F.R. 7045.

#### DEFINITIONS

The definitions in section 472 of Title 40, Public Buildings, Property, and Works, apply to this subchapter.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 257 of this title; title 8 section 1363a; title 16 section 6700; title 19 section 2081; title 26 section 7608; title 38 section 8122.

### § 254a. Cost-type research and development contracts with educational institutions

On and after September 5, 1962, provision may be made in cost-type research and development contracts (including grants) with universities, colleges, or other educational institutions for payment of reimbursable indirect costs on the basis of predetermined fixed-percentage rates applied to the total, or an element thereof, of the reimbursable direct costs incurred.

(Pub. L. 87-638, Sept. 5, 1962, 76 Stat. 437.)

#### CODIFICATION

Section was not enacted as part of title III of act June 30, 1949, ch. 288, 63 Stat. 393, which comprises this subchapter.

### § 254b. Cost or pricing data: truth in negotiations

#### (a) Required cost or pricing data and certification

(1) The head of an executive agency shall require offerors, contractors, and subcontractors to make cost or pricing data available as follows:

(A) An offeror for a prime contract under this subchapter to be entered into using procedures other than sealed-bid procedures shall be required to submit cost or pricing data before the award of a contract if—

(i) in the case of a prime contract entered into after October 13, 1994, the price of the contract to the United States is expected to exceed \$500,000; and

(ii) in the case of a prime contract entered into on or before October 13, 1994, the price of the contract to the United States is expected to exceed \$100,000.

(B) The contractor for a prime contract under this subchapter shall be required to submit cost or pricing data before the pricing of a change or modification to the contract if—

(i) in the case of a change or modification made to a prime contract referred to in subparagraph (A)(i), the price adjustment is expected to exceed \$500,000;

(ii) in the case of a change or modification made to a prime contract that was entered into on or before October 13, 1994, and that has been modified pursuant to paragraph (6), the price adjustment is expected to exceed \$500,000; and

(iii) in the case of a change or modification not covered by clause (i) or (ii), the price adjustment is expected to exceed \$100,000.

(C) An offeror for a subcontract (at any tier) of a contract under this subchapter shall be required to submit cost or pricing data before the award of the subcontract if the prime contractor and each higher-tier subcontractor have been required to make available cost or pricing data under this section and—

(i) in the case of a subcontract under a prime contract referred to in subparagraph (A)(i), the price of the subcontract is expected to exceed \$500,000;

(ii) in the case of a subcontract entered into under a prime contract that was entered into on or before October 13, 1994, and that has been modified pursuant to paragraph (6), the price of the subcontract is expected to exceed \$500,000; and

(iii) in the case of a subcontract not covered by clause (i) or (ii), the price of the subcontract is expected to exceed \$100,000.

(D) The subcontractor for a subcontract covered by subparagraph (C) shall be required to submit cost or pricing data before the pricing of a change or modification to the subcontract if—

(i) in the case of a change or modification to a subcontract referred to in subparagraph (C)(i) or (C)(ii), the price adjustment is expected to exceed \$500,000; and

(ii) in the case of a change or modification to a subcontract referred to in subparagraph (C)(iii), the price adjustment is expected to exceed \$100,000.

(2) A person required, as an offeror, contractor, or subcontractor, to submit cost or pricing data under paragraph (1) (or required by the head of the procuring activity concerned to submit such data under subsection (c) of this section) shall be required to certify that, to the best of the person's knowledge and belief, the cost or pricing data submitted are accurate, complete, and current.

(3) Cost or pricing data required to be submitted under paragraph (1) (or under subsection (c) of this section), and a certification required to be submitted under paragraph (2), shall be submitted—

(A) in the case of a submission by a prime contractor (or an offeror for a prime contract), to the contracting officer for the contract (or to a designated representative of the contracting officer); or

(B) in the case of a submission by a subcontractor (or an offeror for a subcontract), to the prime contractor.

(4) Except as provided under subsection (b) of this section, this section applies to contracts entered into by the head of an executive agency on behalf of a foreign government.

(5) A waiver of requirements for submission of certified cost or pricing data that is granted under subsection (b)(1)(C) of this section in the case of a contract or subcontract does not waive the requirement under paragraph (1)(C) for submission of cost or pricing data in the case of subcontracts under that contract or subcontract unless the head of the procuring activity granting the waiver determines that the requirement under that paragraph should be waived in the case of such subcontracts and justifies in writing the reasons for the determination.

(6) Upon the request of a contractor that was required to submit cost or pricing data under paragraph (1) in connection with a prime contract entered into on or before October 13, 1994, the head of the executive agency that entered into such contract shall modify the contract to reflect subparagraphs (B)(ii) and (C)(ii) of paragraph (1). All such modifications shall be made without requiring consideration.

(7) Effective on October 1 of each year that is divisible by 5, each amount set forth in paragraph (1) shall be adjusted to the amount that is equal to the fiscal year 1994 constant dollar value of the amount set forth. Any amount, as so adjusted, that is not evenly divisible by \$50,000 shall be rounded to the nearest multiple of \$50,000. In the case of an amount that is evenly divisible by \$25,000 but not evenly divisible by \$50,000, the amount shall be rounded to the next higher multiple of \$50,000.

#### **(b) Exceptions**

##### **(1) In general**

Submission of certified cost or pricing data shall not be required under subsection (a) of

this section in the case of a contract, a subcontract, or a modification of a contract or subcontract—

(A) for which the price agreed upon is based on—

- (i) adequate price competition; or
- (ii) prices set by law or regulation;

(B) for the acquisition of a commercial item; or

(C) in an exceptional case when the head of the procuring activity, without delegation, determines that the requirements of this section may be waived and justifies in writing the reasons for such determination.

#### **(2) Modifications of contracts and subcontracts for commercial items**

In the case of a modification of a contract or subcontract for a commercial item that is not covered by the exception to the submission of certified cost or pricing data in paragraph (1)(A) or (1)(B), submission of certified cost or pricing data shall not be required under subsection (a) of this section if—

(A) the contract or subcontract being modified is a contract or subcontract for which submission of certified cost or pricing data may not be required by reason of paragraph (1)(A) or (1)(B); and

(B) the modification would not change the contract or subcontract, as the case may be, from a contract or subcontract for the acquisition of a commercial item to a contract or subcontract for the acquisition of an item other than a commercial item.

#### **(c) Cost or pricing data on below-threshold contracts**

##### **(1) Authority to require submission**

Subject to paragraph (2), when certified cost or pricing data are not required to be submitted by subsection (a) of this section for a contract, subcontract, or modification of a contract or subcontract, such data may nevertheless be required to be submitted by the head of the procuring activity, but only if the head of the procuring activity determines that such data are necessary for the evaluation by the agency of the reasonableness of the price of the contract, subcontract, or modification of a contract or subcontract. In any case in which the head of the procuring activity requires such data to be submitted under this subsection, the head of the procuring activity shall justify in writing the reason for such requirement.

##### **(2) Exception**

The head of the procuring activity may not require certified cost or pricing data to be submitted under this paragraph for any contract or subcontract, or modification of a contract or subcontract, covered by the exceptions in subparagraph (A) or (B) of subsection (b)(1) of this section.

##### **(3) Delegation of authority prohibited**

The head of a procuring activity may not delegate the functions under this paragraph.

#### **(d) Submission of other information**

##### **(1) Authority to require submission**

When certified cost or pricing data are not required to be submitted under this section for

a contract, subcontract, or modification of a contract or subcontract, the contracting officer shall require submission of data other than certified cost or pricing data to the extent necessary to determine the reasonableness of the price of the contract, subcontract, or modification of the contract or subcontract. Except in the case of a contract or subcontract covered by the exceptions in subsection (b)(1)(A) of this section, the contracting officer shall require that the data submitted include, at a minimum, appropriate information on the prices at which the same item or similar items have previously been sold that is adequate for evaluating the reasonableness of the price for the procurement.

**(2) Limitations on authority**

The Federal Acquisition Regulation shall include the following provisions regarding the types of information that contracting officers may require under paragraph (1):

(A) Reasonable limitations on requests for sales data relating to commercial items.

(B) A requirement that a contracting officer limit, to the maximum extent practicable, the scope of any request for information relating to commercial items from an offeror to only that information that is in the form regularly maintained by the offeror in commercial operations.

(C) A statement that any information received relating to commercial items that is exempt from disclosure under section 552(b) of title 5 shall not be disclosed by the Federal Government.

**(e) Price reductions for defective cost or pricing data**

(1)(A) A prime contract (or change or modification to a prime contract) under which a certificate under subsection (a)(2) of this section is required shall contain a provision that the price of the contract to the United States, including profit or fee, shall be adjusted to exclude any significant amount by which it may be determined by the head of the executive agency that such price was increased because the contractor (or any subcontractor required to make available such a certificate) submitted defective cost or pricing data.

(B) For the purposes of this section, defective cost or pricing data are cost or pricing data which, as of the date of agreement on the price of the contract (or another date agreed upon between the parties), were inaccurate, incomplete, or noncurrent. If for purposes of the preceding sentence the parties agree upon a date other than the date of agreement on the price of the contract, the date agreed upon by the parties shall be as close to the date of agreement on the price of the contract as is practicable.

(2) In determining for purposes of a contract price adjustment under a contract provision required by paragraph (1) whether, and to what extent, a contract price was increased because the contractor (or a subcontractor) submitted defective cost or pricing data, it shall be a defense that the United States did not rely on the defective data submitted by the contractor or subcontractor.

(3) It is not a defense to an adjustment of the price of a contract under a contract provision required by paragraph (1) that—

(A) the price of the contract would not have been modified even if accurate, complete, and current cost or pricing data had been submitted by the contractor or subcontractor because the contractor or subcontractor—

(i) was the sole source of the property or services procured; or

(ii) otherwise was in a superior bargaining position with respect to the property or services procured;

(B) the contracting officer should have known that the cost or pricing data in issue were defective even though the contractor or subcontractor took no affirmative action to bring the character of the data to the attention of the contracting officer;

(C) the contract was based on an agreement between the contractor and the United States about the total cost of the contract and there was no agreement about the cost of each item procured under such contract; or

(D) the prime contractor or subcontractor did not submit a certification of cost or pricing data relating to the contract as required under subsection (a)(2) of this section.

(4)(A) A contractor shall be allowed to offset an amount against the amount of a contract price adjustment under a contract provision required by paragraph (1) if—

(i) the contractor certifies to the contracting officer (or to a designated representative of the contracting officer) that, to the best of the contractor's knowledge and belief, the contractor is entitled to the offset; and

(ii) the contractor proves that the cost or pricing data were available before the date of agreement on the price of the contract (or price of the modification), or, if applicable consistent with paragraph (1)(B), another date agreed upon between the parties, and that the data were not submitted as specified in subsection (a)(3) of this section before such date.

(B) A contractor shall not be allowed to offset an amount otherwise authorized to be offset under subparagraph (A) if—

(i) the certification under subsection (a)(2) of this section with respect to the cost or pricing data involved was known to be false when signed; or

(ii) the United States proves that, had the cost or pricing data referred to in subparagraph (A)(i) been submitted to the United States before the date of agreement on the price of the contract (or price of the modification) or, if applicable under paragraph (1)(B), another date agreed upon between the parties, the submission of such cost or pricing data would not have resulted in an increase in that price in the amount to be offset.

**(f) Interest and penalties for certain overpayments**

(1) If the United States makes an overpayment to a contractor under a contract with an executive agency subject to this section and the overpayment was due to the submission by the contractor of defective cost or pricing data, the contractor shall be liable to the United States—

(A) for interest on the amount of such overpayment, to be computed—

(i) for the period beginning on the date the overpayment was made to the contractor and ending on the date the contractor repays the amount of such overpayment to the United States; and

(ii) at the current rate prescribed by the Secretary of the Treasury under section 6621 of title 26; and

(B) if the submission of such defective data was a knowing submission, for an additional amount equal to the amount of the overpayment.

(2) Any liability under this subsection of a contractor that submits cost or pricing data but refuses to submit the certification required by subsection (a)(2) of this section with respect to the cost or pricing data shall not be affected by the refusal to submit such certification.

**(g) Right of United States to examine contractor records**

For the purpose of evaluating the accuracy, completeness, and currency of cost or pricing data required to be submitted by this section, an executive agency shall have the authority provided by section 254d(a)(2) of this title.

**(h) Definitions**

In this section:

**(1) Cost or pricing data**

The term “cost or pricing data” means all facts that, as of the date of agreement on the price of a contract (or the price of a contract modification) or, if applicable consistent with subsection (e)(1)(B) of this section, another date agreed upon between the parties, a prudent buyer or seller would reasonably expect to affect price negotiations significantly. Such term does not include information that is judgmental, but does include the factual information from which a judgment was derived.

**(2) Subcontract**

The term “subcontract” includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or a subcontractor.

**(3) Commercial item**

The term “commercial item” has the meaning provided such term by section 403(12) of this title.

(June 30, 1949, ch. 288, title III, § 304A, as added Pub. L. 103–355, title I, § 1251(a)(2), Oct. 13, 1994, 108 Stat. 3278; amended Pub. L. 104–106, div. D, title XLII, § 4201(b), title XLIII, § 4321(e)(3), (4), Feb. 10, 1996, 110 Stat. 651, 675; Pub. L. 105–261, div. A, title VIII, §§ 805(b), 808(b), Oct. 17, 1998, 112 Stat. 2083, 2085.)

**AMENDMENTS**

1998—Subsec. (a)(5). Pub. L. 105–261, § 805(b), amended par. (5) generally. Prior to amendment, par. (5) read as follows: “For purposes of paragraph (1)(C), a contractor or subcontractor granted a waiver under subsection (b)(1)(B) of this section shall be considered as having been required to make available cost or pricing data under this section.”

Subsec. (d)(1). Pub. L. 105–261, § 808(b), substituted “the contracting officer shall require that the data submitted” for “the data submitted shall”.

1996—Subsec. (b). Pub. L. 104–106, § 4201(b)(1), amended subsec. (b) generally, substituting pars. (1) and (2) relating to submission of certified cost or pricing data for former pars. (1) and (2) relating to submission of cost or pricing data and striking out par. (3) relating to FAR standards.

Subsec. (c). Pub. L. 104–106, § 4201(b)(1), amended subsec. (c) generally, substituting pars. (1) to (3) relating to authority to require submission of certified cost or pricing data for former par. (1) relating to authority to require submission of cost or pricing data and striking out former par. (2) relating to authority to require information other than certified cost or pricing data.

Subsec. (c)(1). Pub. L. 104–106, § 4321(e)(3), which directed amendment of heading of par. (1) by changing each letter that is capitalized (other than the first letter of the first word) to lowercase, could not be executed because of the general amendment of subsec. (c) by Pub. L. 104–106, § 4201(b)(1). See above.

Subsec. (d). Pub. L. 104–106, § 4201(b)(1), amended subsec. (d) generally, substituting pars. (1) and (2) relating to submission of other information for former pars. (1) to (6) relating to additional exceptions regarding commercial items.

Subsec. (d)(2)(A)(ii). Pub. L. 104–106, § 4321(e)(4), which directed amendment of par. (2)(A)(ii) by inserting “to” after “The information referred”, could not be executed because par. (2)(A) did not contain a cl. (ii) or the phrase “The information referred”, subsequent to the general amendment of subsec. (d) by Pub. L. 104–106, § 4201(b)(1). See above.

Subsecs. (h), (i). Pub. L. 104–106, § 4201(b)(2), redesignated subsec. (i) as (h) and struck out heading and text of former subsec. (h). Text read as follows: “The Federal Acquisition Regulation shall include regulations concerning the types of information that offerors must submit for a contracting officer to consider in determining whether the price of a procurement to the Government is fair and reasonable when certified cost or pricing data are not required to be submitted under this section because the price of the procurement to the United States is not expected to exceed the applicable threshold amount set forth in subsection (a) of this section (as adjusted pursuant to paragraph (7) of such subsection). Such information, at a minimum, shall include appropriate information on the prices at which the same item or similar items have previously been sold that is adequate for evaluating the reasonableness of the price of a proposed contract or subcontract for the procurement.”

**EFFECTIVE DATE OF 1996 AMENDMENT**

For effective date and applicability of amendment by Pub. L. 104–106, see section 4401 of Pub. L. 104–106, set out as a note under section 251 of this title.

**EFFECTIVE DATE**

For effective date and applicability of section, see section 10001 of Pub. L. 103–355, set out as an Effective Date of 1994 Amendment note under section 251 of this title.

Section 1251(b) of Pub. L. 103–355, as amended by Pub. L. 104–106, div. D, title XLIII, § 4321(a)(3), Feb. 10, 1996, 110 Stat. 671, provided that: “Subsection (a) of section 304A of the Federal Property and Administrative Services Act of 1949 [subsec. (a) of this section], as added by subsection (a), shall apply according to the provisions thereof on and after the date of the enactment of this Act [Oct. 13, 1994], notwithstanding section 10001(b) [see Effective Date of 1994 Amendment note set out under section 251 of this title].”

[Section 4321(a) of Pub. L. 104–106 provided that the amendment made by that section to section 1251(b) of Pub. L. 103–355, set out above, is effective as of Oct. 13, 1994, and as if included in Pub. L. 103–355 as enacted.]

**ELIGIBILITY FOR CONTRACTS AND SUBCONTRACTS TO BE CONDITIONED ON COMPLIANCE**

Pub. L. 105–261, div. A, title VIII, § 808(c), Oct. 17, 1998, 112 Stat. 2085, provided that: “Not later than 180 days

after the date of the enactment of this Act [Oct. 17, 1998], the Federal Acquisition Regulation shall be amended to provide that an offeror's compliance with a requirement to submit data for a contract or subcontract in accordance with section 2306a(d)(1) of title 10, United States Code, or section 304A(d)(1) of the Federal Property and Administrative Services Act of 1949 [41 U.S.C. 254b(d)(1)] shall be a condition for the offeror to be eligible to enter into the contract or subcontract, subject to such exceptions as the Federal Acquisition Regulatory Council determines appropriate."

#### CRITERIA FOR DETERMINING SPECIFIC PRICE INFORMATION REQUIRED

Pub. L. 105-261, div. A, title VIII, §808(d), Oct. 17, 1998, 112 Stat. 2085, provided that: "Not later than 180 days after the date of the enactment of this Act [Oct. 17, 1998], the Federal Acquisition Regulation shall be amended to include criteria for contracting officers to apply for determining the specific price information that an offeror should be required to submit under section 2306a(d) of title 10, United States Code, or section 304A(d) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 254b(d))."

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 254d, 423 of this title; title 15 section 205c.

### § 254c. Multiyear contracts

#### (a) Authority

An executive agency may enter into a multiyear contract for the acquisition of property or services if—

(1) funds are available and obligated for such contract, for the full period of the contract or for the first fiscal year in which the contract is in effect, and for the estimated costs associated with any necessary termination of such contract; and

(2) the executive agency determines that—

(A) the need for the property or services is reasonably firm and continuing over the period of the contract; and

(B) a multiyear contract will serve the best interests of the United States by encouraging full and open competition or promoting economy in administration, performance, and operation of the agency's programs.

#### (b) Termination clause

A multiyear contract entered into under the authority of this section shall include a clause that provides that the contract shall be terminated if funds are not made available for the continuation of such contract in any fiscal year covered by the contract. Amounts available for paying termination costs shall remain available for such purpose until the costs associated with termination of the contract are paid.

#### (c) Cancellation ceiling notice

Before any contract described in subsection (a) of this section that contains a clause setting forth a cancellation ceiling in excess of \$10,000,000 may be awarded, the executive agency shall give written notification of the proposed contract and of the proposed cancellation ceiling for that contract to the Congress, and such contract may not then be awarded until the end of a period of 30 days beginning on the date of such notification.

#### (d) Multiyear contract defined

For the purposes of this section, a multiyear contract is a contract for the purchase of property or services for more than one, but not more than five, program years. Such a contract may provide that performance under the contract during the second and subsequent years of the contract is contingent upon the appropriation of funds and (if it does so provide) may provide for a cancellation payment to be made to the contractor if such appropriations are not made.

#### (e) Rule of construction

Nothing in this section is intended to modify or affect any other provision of law that authorizes multiyear contracts.

(June 30, 1949, ch. 288, title III, §304B, as added Pub. L. 103-355, title I, §1072, Oct. 13, 1994, 108 Stat. 3270.)

#### EFFECTIVE DATE

For effective date and applicability of section, see section 10001 of Pub. L. 103-355, set out as an Effective Date of 1994 Amendment note under section 251 of this title.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 253l-1, 253l-2, 253l-3, 253l-4 of this title; title 42 section 7274n.

### § 254d. Examination of records of contractor

#### (a) Agency authority

(1) The head of an executive agency, acting through an authorized representative, is authorized to inspect the plant and audit the records of—

(A) a contractor performing a cost-reimbursement, incentive, time-and-materials, labor-hour, or price-redeterminable contract, or any combination of such contracts, made by that executive agency under this subchapter; and

(B) a subcontractor performing any cost-reimbursement, incentive, time-and-materials, labor-hour, or price-redeterminable subcontract or any combination of such subcontracts under a contract referred to in subparagraph (A).

(2) The head of an executive agency, acting through an authorized representative, is authorized, for the purpose of evaluating the accuracy, completeness, and currency of certified cost or pricing data required to be submitted pursuant to section 254b of this title with respect to a contract or subcontract, to examine all records of the contractor or subcontractor related to—

(A) the proposal for the contract or subcontract;

(B) the discussions conducted on the proposal;

(C) pricing of the contract or subcontract; or

(D) performance of the contract or subcontract.

#### (b) Subpoena power

(1) The Inspector General of an executive agency appointed under section 3 or 8G<sup>1</sup> of the Inspector General Act of 1978 (5 U.S.C. App.) or,

<sup>1</sup> See References in Text note below.



upon request of the head of an executive agency, the Director of the Defense Contract Audit Agency (or any successor agency) of the Department of Defense or the Inspector General of the General Services Administration may require by subpoena the production of records of a contractor, access to which is provided for that executive agency by subsection (a) of this section.

(2) Any such subpoena, in the case of contumacy or refusal to obey, shall be enforceable by order of an appropriate United States district court.

(3) The authority provided by paragraph (1) may not be delegated.

(4) In the year following a year in which authority provided in paragraph (1) is exercised for an executive agency, the head of the executive agency shall submit to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives a report on the exercise of such authority during such preceding year and the reasons why such authority was exercised in any instance.

**(c) Comptroller General authority**

(1) Except as provided in paragraph (2), each contract awarded after using procedures other than sealed bid procedures shall provide that the Comptroller General and his representatives are authorized to examine any records of the contractor, or any of its subcontractors, that directly pertain to, and involve transactions relating to, the contract or subcontract.

(2) Paragraph (1) does not apply to a contract or subcontract with a foreign contractor or foreign subcontractor if the executive agency concerned determines, with the concurrence of the Comptroller General or his designee, that the application of that paragraph to the contract or subcontract would not be in the public interest. However, the concurrence of the Comptroller General or his designee is not required—

(A) where the contractor or subcontractor is a foreign government or agency thereof or is precluded by the laws of the country involved from making its records available for examination; and

(B) where the executive agency determines, after taking into account the price and availability of the property and services from United States sources, that the public interest would be best served by not applying paragraph (1).

(3) Paragraph (1) may not be construed to require a contractor or subcontractor to create or maintain any record that the contractor or subcontractor does not maintain in the ordinary course of business or pursuant to another provision of law.

**(d) Limitation on audits relating to indirect costs**

An executive agency may not perform an audit of indirect costs under a contract, subcontract, or modification before or after entering into the contract, subcontract, or modification in any case in which the contracting officer determines that the objectives of the audit can reasonably be met by accepting the results of an audit that was conducted by any other department or agency of the Federal Government

within one year preceding the date of the contracting officer's determination.

**(e) Limitation**

The authority of an executive agency under subsection (a) of this section, and the authority of the Comptroller General under subsection (c) of this section, with respect to a contract or subcontract shall expire three years after final payment under such contract or subcontract.

**(f) Inapplicability to certain contracts**

This section does not apply to the following contracts:

(1) Contracts for utility services at rates not exceeding those established to apply uniformly to the public, plus any applicable reasonable connection charge.

(2) A contract or subcontract that is not greater than the simplified acquisition threshold.

**(g) Form of original record storage**

Nothing in this section shall be construed to preclude a contractor from duplicating or storing original records in electronic form.

**(h) Use of images of original records**

An executive agency shall not require a contractor or subcontractor to provide original records in an audit carried out pursuant to this section if the contractor or subcontractor provides photographic or electronic images of the original records and meets the following requirements:

(1) The contractor or subcontractor has established procedures to ensure that the imaging process preserves the integrity, reliability, and security of the original records.

(2) The contractor or subcontractor maintains an effective indexing system to permit timely and convenient access to the imaged records.

(3) The contractor or subcontractor retains the original records for a minimum of one year after imaging to permit periodic validation of the imaging systems.

**(i) "Records" defined**

In this section, the term "records" includes books, documents, accounting procedures and practices, and other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form.

(June 30, 1949, ch. 288, title III, §304C, as added and amended Pub. L. 103-355, title II, §2251(a), title IV, §4103(d), Oct. 13, 1994, 108 Stat. 3318, 3341; Pub. L. 104-106, div. D, title XLIII, §4321(e)(5), Feb. 10, 1996, 110 Stat. 675; Pub. L. 104-201, div. A, title VIII, §808(b), Sept. 23, 1996, 110 Stat. 2607.)

REFERENCES IN TEXT

Section 3 and 8G of the Inspector General Act of 1978, referred to in subsec. (b)(1), are sections 3 and 8G of Pub. L. 95-452, which are set out in the Appendix to Title 5, Government Organization and Employees. The reference to section 8G of the Act probably means the section 8G which was renumbered by Pub. L. 103-204, §23(a)(3), Dec. 17, 1993, 107 Stat. 2408, and which relates to requirements for Federal entities and designated Federal entities.

## AMENDMENTS

1996—Subsec. (a)(2). Pub. L. 104-106 substituted “section 254b” for “section 254c”.

Subsec. (d). Pub. L. 104-201 amended heading and text of subsec. (d) generally. Prior to amendment, text read as follows: “An executive agency may not perform a preaward audit to evaluate proposed indirect costs under any contract, subcontract, or modification to be entered into in accordance with this subchapter in any case in which the contracting officer determines that the objectives of the audit can reasonably be met by accepting the results of an audit conducted by any other department or agency of the Federal Government within one year preceding the date of the contracting officer’s determination.”

1994—Subsec. (f)(2). Pub. L. 103-355, § 4103(d), added par. (2).

## CHANGE OF NAME

Committee on Government Operations of House of Representatives treated as referring to Committee on Government Reform and Oversight of House of Representatives by section 1(a) of Pub. L. 104-14, set out as a note preceding section 21 of Title 2, The Congress. Committee on Government Reform and Oversight of House of Representatives changed to Committee on Government Reform of House of Representatives by House Resolution No. 5, One Hundred Sixth Congress, Jan. 6, 1999.

## EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104-106, see section 4401 of Pub. L. 104-106, set out as a note under section 251 of this title.

## EFFECTIVE DATE

For effective date and applicability of section, including amendment by Pub. L. 103-355, see section 10001 of Pub. L. 103-355, set out as an Effective Date of 1994 Amendment note under section 251 of this title.

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 254b, 262 of this title.

**§ 255. Contract financing****(a) Payment authority**

Any executive agency may—

(1) make advance, partial, progress or other payments under contracts for property or services made by the agency; and

(2) insert in solicitations for procurement of property or services a provision limiting to small business concerns advance or progress payments.

**(b) Performance-based payments**

Whenever practicable, payments under subsection (a) of this section shall be made on any of the following bases:

(1) Performance measured by objective, quantifiable methods such as delivery of acceptable items, work measurement, or statistical process controls.

(2) Accomplishment of events defined in the program management plan.

(3) Other quantifiable measures of results.

**(c) Payment amount**

Payments made under subsection (a) of this section may not exceed the unpaid contract price.

**(d) Security for advance payments**

Advance payments under subsection (a) of this section may be made only upon adequate secu-

rity and a determination by the agency head that to do so would be in the public interest. Such security may be in the form of a lien in favor of the Government on the property contracted for, on the balance in an account in which such payments are deposited, and on such of the property acquired for performance of the contract as the parties may agree. This lien shall be paramount to all other liens and is effective immediately upon the first advancement of funds without filing, notice, or any other action by the United States.

**(e) Conditions for progress payments**

(1) The executive agency shall ensure that any payment for work in progress (including materials, labor, and other items) under a contract of an executive agency that provides for such payments is commensurate with the work accomplished that meets standards established under the contract. The contractor shall provide such information and evidence as the executive agency determines necessary to permit the executive agency to carry out the preceding sentence.

(2) The executive agency shall ensure that progress payments referred to in paragraph (1) are not made for more than 80 percent of the work accomplished under the contract so long as the executive agency has not made the contractual terms, specifications, and price definite.

(3) This subsection applies to any contract in an amount greater than \$25,000.

**(f) Conditions for payments for commercial items**

(1) Payments under subsection (a) of this section for commercial items may be made under such terms and conditions as the head of the executive agency determines are appropriate or customary in the commercial marketplace and are in the best interests of the United States. The head of the executive agency shall obtain adequate security for such payments. If the security is in the form of a lien in favor of the United States, such lien is paramount to all other liens and is effective immediately upon the first payment, without filing, notice, or other action by the United States.

(2) Advance payments made under subsection (a) of this section for commercial items may include payments, in a total amount of not more than 15 percent of the contract price, in advance of any performance of work under the contract.

(3) The conditions of subsections (d) and (e) of this section need not be applied if they would be inconsistent, as determined by the head of the executive agency, with commercial terms and conditions pursuant to paragraphs (1) and (2).

**(g) Action in case of fraud**

(1) In any case in which the remedy coordination official of an executive agency finds that there is substantial evidence that the request of a contractor for advance, partial, or progress payment under a contract awarded by that executive agency is based on fraud, the remedy coordination official shall recommend that the executive agency reduce or suspend further payments to such contractor.

(2) The head of an executive agency receiving a recommendation under paragraph (1) in the case of a contractor’s request for payment under

a contract shall determine whether there is substantial evidence that the request is based on fraud. Upon making such a determination, the head of the executive agency may reduce or suspend further payments to the contractor under such contract.

(3) The extent of any reduction or suspension of payments by an executive agency under paragraph (2) on the basis of fraud shall be reasonably commensurate with the anticipated loss to the United States resulting from the fraud.

(4) A written justification for each decision of the head of an executive agency whether to reduce or suspend payments under paragraph (2), and for each recommendation received by the executive agency in connection with such decision, shall be prepared and be retained in the files of the executive agency.

(5) The head of each executive agency shall prescribe procedures to ensure that, before the head of the executive agency decides to reduce or suspend payments in the case of a contractor under paragraph (2), the contractor is afforded notice of the proposed reduction or suspension and an opportunity to submit matters to the executive agency in response to such proposed reduction or suspension.

(6) Not later than 180 days after the date on which the head of an executive agency reduces or suspends payments to a contractor under paragraph (2), the remedy coordination official of the executive agency shall—

(A) review the determination of fraud on which the reduction or suspension is based; and

(B) transmit a recommendation to the head of such executive agency whether the suspension or reduction should continue.

(7) The head of each executive agency who receives recommendations made by a remedy coordination official of the executive agency to reduce or suspend payments under paragraph (2) during a fiscal year shall prepare for such year a report that contains the recommendations, the actions taken on the recommendations and the reasons for such actions, and an assessment of the effects of such actions on the Federal Government. Any such report shall be available to any Member of Congress upon request.

(8) The head of an executive agency may not delegate responsibilities under this subsection to any person in a position below level IV of the Executive Schedule.

(9) In this subsection, the term “remedy coordination official”, with respect to an executive agency, means the person or entity in that executive agency who coordinates within that executive agency the administration of criminal, civil, administrative, and contractual remedies resulting from investigations of fraud or corruption related to procurement activities.

(June 30, 1949, ch. 288, title III, §305, 63 Stat. 396; July 12, 1952, ch. 703, §1(m), 66 Stat. 594; Pub. L. 85-800, §4, Aug. 28, 1958, 72 Stat. 966; Pub. L. 103-355, title II, §2051(a)–(e), Oct. 13, 1994, 108 Stat. 3303, 3304; Pub. L. 104-106, div. D, title XLIII, §4321(a)(4), Feb. 10, 1996, 110 Stat. 671.)

#### REFERENCES IN TEXT

Level IV of the Executive Schedule, referred to in subsec. (g)(8), is set out in section 5315 of Title 5, Government Organization and Employees.

#### AMENDMENTS

1996—Subsecs. (e) to (g). Pub. L. 104-106 made technical correction to directory language of Pub. L. 103-355, §2051(e). See 1994 Amendment note below.

1994—Pub. L. 103-355, §2051(a)(1), inserted section catchline.

Subsec. (a). Pub. L. 103-355, §2051(a)(2), (c), inserted heading and struck out “bid” before “solicitations” in par. (2).

Subsec. (b). Pub. L. 103-355, §2051(a)(5), (b), added subsec. (b) and redesignated former subsec. (b) as (c).

Pub. L. 103-355, §2051(a)(3), inserted heading.

Subsec. (c). Pub. L. 103-355, §2051(a)(5), redesignated subsec. (b) as (c). Former subsec. (c) redesignated (d).

Pub. L. 103-355, §2051(a)(4), inserted heading.

Subsec. (d). Pub. L. 103-355, §2051(d), inserted before period at end of third sentence “and is effective immediately upon the first advancement of funds without filing, notice, or any other action by the United States”.

Pub. L. 103-355, §2051(a)(5), redesignated subsec. (c) as (d).

Subsecs. (e) to (g). Pub. L. 103-355, §2051(e), as amended by Pub. L. 104-106, added subsecs. (e) to (g).

1958—Pub. L. 85-800 authorized advance or other payments under contracts for property or services by agency and insertion in bid solicitations of provision limiting advance or progress payments to small business concerns, restricted payments under subsec. (a) of this section to unpaid contract price, and reworded generally conditions for making advance payments.

1952—Subsecs. (a), (b). Act July 12, 1952, substituted “property” for “supplies” wherever appearing.

#### EFFECTIVE DATE OF 1996 AMENDMENT

Section 4321(a) of Pub. L. 104-106 provided that the amendment made by that section is effective as of Oct. 13, 1994, and as if included in Pub. L. 103-355 as enacted.

#### EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103-355, see section 10001 of Pub. L. 103-355, set out as a note under section 251 of this title.

#### EFFECTIVE DATE

Section effective July 1, 1949, see section 605 of act June 30, 1949, set out as a note under section 471 of Title 40, Public Buildings, Property, and Works.

#### EXEMPTION OF FUNCTIONS

Functions authorized by Foreign Assistance Act of 1961, as amended, as exempt, see Ex. Ord. No. 11223, eff. May 12, 1965, 30 F.R. 6635, set out as a note under section 2393 of Title 22, Foreign Relations and Intercourse.

#### RELATIONSHIP TO PROMPT PAYMENT REQUIREMENTS

Section 2051(f) of Pub. L. 103-355 provided that: “The amendments made by this section [amending this section] are not intended to impair or modify procedures required by the provisions of chapter 39 of title 31, United States Code, and the regulations issued pursuant to such provisions of law (as such procedures are in effect on the date of the enactment of this Act [Oct. 13, 1994]), except that the Government may accept payment terms offered by a contractor offering a commercial item.”

#### DEFINITIONS

The definitions in section 472 of Title 40, Public Buildings, Property, and Works, apply to this subchapter.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 257, 262 of this title; title 8 section 1363a; title 19 section 2081; title 26 section 7608.

### § 256. Allowable costs

#### (a) Indirect cost that violates FAR cost principle

An executive agency shall require that a covered contract provide that if the contractor sub-

mits to the executive agency a proposal for settlement of indirect costs incurred by the contractor for any period after such costs have been accrued and if that proposal includes the submission of a cost which is unallowable because the cost violates a cost principle in the Federal Acquisition Regulation (referred to in section 421(c)(1) of this title) or an executive agency supplement to the Federal Acquisition Regulation, the cost shall be disallowed.

**(b) Penalty for violation of cost principle**

(1) If the executive agency determines that a cost submitted by a contractor in its proposal for settlement is expressly unallowable under a cost principle referred to in subsection (a) of this section that defines the allowability of specific selected costs, the executive agency shall assess a penalty against the contractor in an amount equal to—

(A) the amount of the disallowed cost allocated to covered contracts for which a proposal for settlement of indirect costs has been submitted; plus

(B) interest (to be computed based on provisions in the Federal Acquisition Regulation) to compensate the United States for the use of any funds which a contractor has been paid in excess of the amount to which the contractor was entitled.

(2) If the executive agency determines that a proposal for settlement of indirect costs submitted by a contractor includes a cost determined to be unallowable in the case of such contractor before the submission of such proposal, the executive agency shall assess a penalty against the contractor in an amount equal to two times the amount of the disallowed cost allocated to covered contracts for which a proposal for settlement of indirect costs has been submitted.

**(c) Waiver of penalty**

The Federal Acquisition Regulation shall provide for a penalty under subsection (b) of this section to be waived in the case of a contractor's proposal for settlement of indirect costs when—

(1) the contractor withdraws the proposal before the formal initiation of an audit of the proposal by the Federal Government and re-submits a revised proposal;

(2) the amount of unallowable costs subject to the penalty is insignificant; or

(3) the contractor demonstrates, to the contracting officer's satisfaction, that—

(A) it has established appropriate policies and personnel training and an internal control and review system that provide assurances that unallowable costs subject to penalties are precluded from being included in the contractor's proposal for settlement of indirect costs; and

(B) the unallowable costs subject to the penalty were inadvertently incorporated into the proposal.

**(d) Applicability of contract disputes procedure to disallowance of cost and assessment of penalty**

An action of an executive agency under subsection (a) or (b) of this section—

(1) shall be considered a final decision for the purposes of section 605 of this title; and

(2) is appealable in the manner provided in section 606 of this title.

**(e) Specific costs not allowable**

(1) The following costs are not allowable under a covered contract:

(A) Costs of entertainment, including amusement, diversion, and social activities, and any costs directly associated with such costs (such as tickets to shows or sports events, meals, lodging, rentals, transportation, and gratuities).

(B) Costs incurred to influence (directly or indirectly) legislative action on any matter pending before Congress, a State legislature, or a legislative body of a political subdivision of a State.

(C) Costs incurred in defense of any civil or criminal fraud proceeding or similar proceeding (including filing of any false certification) brought by the United States where the contractor is found liable or had pleaded nolo contendere to a charge of fraud or similar proceeding (including filing of a false certification).

(D) Payments of fines and penalties resulting from violations of, or failure to comply with, Federal, State, local, or foreign laws and regulations, except when incurred as a result of compliance with specific terms and conditions of the contract or specific written instructions from the contracting officer authorizing in advance such payments in accordance with applicable provisions of the Federal Acquisition Regulation.

(E) Costs of membership in any social, dining, or country club or organization.

(F) Costs of alcoholic beverages.

(G) Contributions or donations, regardless of the recipient.

(H) Costs of advertising designed to promote the contractor or its products.

(I) Costs of promotional items and memorabilia, including models, gifts, and souvenirs.

(J) Costs for travel by commercial aircraft which exceed the amount of the standard commercial fare.

(K) Costs incurred in making any payment (commonly known as a 'golden parachute payment') which is—

(i) in an amount in excess of the normal severance pay paid by the contractor to an employee upon termination of employment; and

(ii) is paid to the employee contingent upon, and following, a change in management control over, or ownership of, the contractor or a substantial portion of the contractor's assets.

(L) Costs of commercial insurance that protects against the costs of the contractor for correction of the contractor's own defects in materials or workmanship.

(M) Costs of severance pay paid by the contractor to foreign nationals employed by the contractor under a service contract performed outside the United States, to the extent that the amount of severance pay paid in any case exceeds the amount paid in the industry involved under the customary or prevailing practice for firms in that industry providing

similar services in the United States, as determined under the Federal Acquisition Regulation.

(N) Costs of severance pay paid by the contractor to a foreign national employed by the contractor under a service contract performed in a foreign country if the termination of the employment of the foreign national is the result of the closing of, or the curtailment of activities at, a United States facility in that country at the request of the government of that country.

(O) Costs incurred by a contractor in connection with any criminal, civil, or administrative proceeding commenced by the United States or a State, to the extent provided in subsection (k) of this section.

(P) Costs of compensation of senior executives of contractors for a fiscal year, regardless of the contract funding source, to the extent that such compensation exceeds the benchmark compensation amount determined applicable for the fiscal year by the Administrator for Federal Procurement Policy under section 435 of this title.

(2)(A) Pursuant to the Federal Acquisition Regulation and subject to the availability of appropriations, an executive agency, in awarding a covered contract, may waive the application of the provisions of paragraphs (1)(M) and (1)(N) to that contract if the executive agency determines that—

(i) the application of such provisions to the contract would adversely affect the continuation of a program, project, or activity that provides significant support services for employees of the executive agency posted outside the United States;

(ii) the contractor has taken (or has established plans to take) appropriate actions within the contractor's control to minimize the amount and number of incidents of the payment of severance pay by the contractor to employees under the contract who are foreign nationals; and

(iii) the payment of severance pay is necessary in order to comply with a law that is generally applicable to a significant number of businesses in the country in which the foreign national receiving the payment performed services under the contract or is necessary to comply with a collective bargaining agreement.

(B) An executive agency shall include in the solicitation for a covered contract a statement indicating—

(i) that a waiver has been granted under subparagraph (A) for the contract; or

(ii) whether the executive agency will consider granting such a waiver, and, if the executive agency will consider granting a waiver, the criteria to be used in granting the waiver.

(C) An executive agency shall make the final determination regarding whether to grant a waiver under subparagraph (A) with respect to a covered contract before award of the contract.

(3) The provisions of the Federal Acquisition Regulation implementing this section may establish appropriate definitions, exclusions, limitations, and qualifications. Any submission by a

contractor of costs which are incurred by the contractor and which are claimed to be allowable under Department of Energy management and operating contracts shall be considered a "proposal for settlement of indirect costs incurred by the contractor for any period after such costs have been accrued", as used in this section.

#### **(f) Required regulations**

(1) The Federal Acquisition Regulation shall contain provisions on the allowability of contractor costs. Such provisions shall define in detail and in specific terms those costs which are unallowable, in whole or in part, under covered contracts. The regulations shall, at a minimum, clarify the cost principles applicable to contractor costs of the following:

(A) Air shows.

(B) Membership in civic, community, and professional organizations.

(C) Recruitment.

(D) Employee morale and welfare.

(E) Actions to influence (directly or indirectly) executive branch action on regulatory and contract matters (other than costs incurred in regard to contract proposals pursuant to solicited or unsolicited bids).

(F) Community relations.

(G) Dining facilities.

(H) Professional and consulting services, including legal services.

(I) Compensation.

(J) Selling and marketing.

(K) Travel.

(L) Public relations.

(M) Hotel and meal expenses.

(N) Expense of corporate aircraft.

(O) Company-furnished automobiles.

(P) Advertising.

(Q) Conventions.

(2) The Federal Acquisition Regulation shall require that a contracting officer not resolve any questioned costs until the contracting officer has obtained—

(A) adequate documentation with respect to such costs; and

(B) the opinion of the contract auditor on the allowability of such costs.

(3) The Federal Acquisition Regulation shall provide that, to the maximum extent practicable, a contract auditor be present at any negotiation or meeting with the contractor regarding a determination of the allowability of indirect costs of the contractor.

(4) The Federal Acquisition Regulation shall require that all categories of costs designated in the report of a contract auditor as questioned with respect to a proposal for settlement be resolved in such a manner that the amount of the individual questioned costs that are paid will be reflected in the settlement.

#### **(g) Applicability of regulations to subcontractors**

The regulations referred to in subsections (e) and (f)(1) of this section shall require prime contractors of a covered contract, to the maximum extent practicable, to apply the provisions of such regulations to all subcontractors of the covered contract.

#### **(h) Contractor certification required**

(1) A proposal for settlement of indirect costs applicable to a covered contract shall include a

certification by an official of the contractor that, to the best of the certifying official's knowledge and belief, all indirect costs included in the proposal are allowable. Any such certification shall be in a form prescribed in the Federal Acquisition Regulation.

(2) An executive agency may, in an exceptional case, waive the requirement for certification under paragraph (1) in the case of any contract if the agency—

(A) determines in such case that it would be in the interest of the United States to waive such certification; and

(B) states in writing the reasons for that determination and makes such determination available to the public.

**(i) Penalties for submission of cost known as not allowable**

The submission to an executive agency of a proposal for settlement of costs for any period after such costs have been accrued that includes a cost that is expressly specified by statute or regulation as being unallowable, with the knowledge that such cost is unallowable, shall be subject to the provisions of section 287 of title 18 and section 3729 of title 31.

**(j) Contractor to have burden of proof**

In a proceeding before a board of contract appeals, the United States Court of Federal Claims, or any other Federal court in which the reasonableness of indirect costs for which a contractor seeks reimbursement from the United States is in issue, the burden of proof shall be upon the contractor to establish that those costs are reasonable.

**(k) Proceeding costs not allowable**

(1) Except as otherwise provided in this subsection, costs incurred by a contractor in connection with any criminal, civil, or administrative proceeding commenced by the United States or a State are not allowable as reimbursable costs under a covered contract if the proceeding (A) relates to a violation of, or failure to comply with, a Federal or State statute or regulation, and (B) results in a disposition described in paragraph (2).

(2) A disposition referred to in paragraph (1)(B) is any of the following:

(A) In the case of a criminal proceeding, a conviction (including a conviction pursuant to a plea of *nolo contendere*) by reason of the violation or failure referred to in paragraph (1).

(B) In the case of a civil or administrative proceeding involving an allegation of fraud or similar misconduct, a determination of contractor liability on the basis of the violation or failure referred to in paragraph (1).

(C) In the case of any civil or administrative proceeding, the imposition of a monetary penalty by reason of the violation or failure referred to in paragraph (1).

(D) A final decision—

(i) to debar or suspend the contractor,

(ii) to rescind or void the contract, or

(iii) to terminate the contract for default,

by reason of the violation or failure referred to in paragraph (1).

(E) A disposition of the proceeding by consent or compromise if such action could have

resulted in a disposition described in subparagraph (A), (B), (C), or (D).

(3) In the case of a proceeding referred to in paragraph (1) that is commenced by the United States and is resolved by consent or compromise pursuant to an agreement entered into by a contractor and the United States, the costs incurred by the contractor in connection with such proceeding that are otherwise not allowable as reimbursable costs under such paragraph may be allowed to the extent specifically provided in such agreement.

(4) In the case of a proceeding referred to in paragraph (1) that is commenced by a State, the executive agency that awarded the covered contract involved in the proceeding may allow the costs incurred by the contractor in connection with such proceeding as reimbursable costs if the executive agency determines, in accordance with the Federal Acquisition Regulation, that the costs were incurred as a result of (A) a specific term or condition of the contract, or (B) specific written instructions of the executive agency.

(5)(A) Except as provided in subparagraph (C), costs incurred by a contractor in connection with a criminal, civil, or administrative proceeding commenced by the United States or a State in connection with a covered contract may be allowed as reimbursable costs under the contract if such costs are not disallowable under paragraph (1), but only to the extent provided in subparagraph (B).

(B)(i) The amount of the costs allowable under subparagraph (A) in any case may not exceed the amount equal to 80 percent of the amount of the costs incurred, to the extent that such costs are determined to be otherwise allowable and allocable under the Federal Acquisition Regulation.

(ii) Regulations issued for the purpose of clause (i) shall provide for appropriate consideration of the complexity of procurement litigation, generally accepted principles governing the award of legal fees in civil actions involving the United States as a party, and such other factors as may be appropriate.

(C) In the case of a proceeding referred to in subparagraph (A), contractor costs otherwise allowable as reimbursable costs under this paragraph are not allowable if (i) such proceeding involves the same contractor misconduct alleged as the basis of another criminal, civil, or administrative proceeding, and (ii) the costs of such other proceeding are not allowable under paragraph (1).

(6) In this subsection:

(A) The term “proceeding” includes an investigation.

(B) The term “costs”, with respect to a proceeding—

(i) means all costs incurred by a contractor, whether before or after the commencement of any such proceeding; and

(ii) includes—

(I) administrative and clerical expenses;

(II) the cost of legal services, including legal services performed by an employee of the contractor;

(III) the cost of the services of accountants and consultants retained by the contractor; and

(IV) the pay of directors, officers, and employees of the contractor for time devoted by such directors, officers, and employees to such proceeding.

(C) The term “penalty” does not include restitution, reimbursement, or compensatory damages.

**(I) “Covered contract” defined**

(1) In this section, the term “covered contract” means a contract for an amount in excess of \$500,000 that is entered into by an executive agency, except that such term does not include a fixed-price contract without cost incentives or any firm, fixed price contract for the purchase of commercial items.

(2) Effective on October 1 of each year that is divisible by five, the amount set forth in paragraph (1) shall be adjusted to the equivalent amount in constant fiscal year 1994 dollars. An amount, as so adjusted, that is not evenly divisible by \$50,000 shall be rounded to the nearest multiple of \$50,000. In the case of an amount that is evenly divisible by \$25,000 but is not evenly divisible by \$50,000, the amount shall be rounded to the next higher multiple of \$50,000.

**(m) Other definitions**

In this section:

(1) The term “compensation”, for a fiscal year, means the total amount of wages, salary, bonuses and deferred compensation for the fiscal year, whether paid, earned, or otherwise accruing, as recorded in an employer’s cost accounting records for the fiscal year.

(2) The term “senior executives”, with respect to a contractor, means the five most highly compensated employees in management positions at each home office and each segment of the contractor.

(3) The term “fiscal year” means a fiscal year established by a contractor for accounting purposes.

(June 30, 1949, ch. 288, title III, §306, as added Pub. L. 100-700, §8(a)(1), Nov. 19, 1988, 102 Stat. 4634; amended Pub. L. 103-355, title II, §2151, Oct. 13, 1994, 108 Stat. 3309; Pub. L. 105-85, div. A, title VIII, §808(b), Nov. 18, 1997, 111 Stat. 1836; Pub. L. 105-261, div. A, title VIII, §804(b), Oct. 17, 1998, 112 Stat. 2083.)

**PRIOR PROVISIONS**

A prior section 256, act June 30, 1949, ch. 288, title III, §306, 63 Stat. 396, related to waiver of liquidated damages, prior to repeal by act Sept. 5, 1950, ch. 849, §10(b), 64 Stat. 591, eff. July 1, 1949. See section 256a of this title.

**AMENDMENTS**

1998—Subsec. (m)(2). Pub. L. 105-261 amended par. (2) generally. Prior to amendment, par. (2) read as follows: “The term ‘senior executive’, with respect to a contractor, means—

“(A) the chief executive officer of the contractor or any individual acting in a similar capacity for the contractor;

“(B) the four most highly compensated employees in management positions of the contractor other than the chief executive officer; and

“(C) in the case of a contractor that has components which report directly to the contractor’s headquarters, the five most highly compensated individuals in management positions at each such component.”

1997—Subsec. (e)(1)(P). Pub. L. 105-85, §808(b)(1), added subpar. (P).

Subsec. (m). Pub. L. 105-85, §808(b)(2), added subsec. (m).

1994—Pub. L. 103-355 amended section generally, substituting present provisions for provisions outlining limitations on allowability of costs incurred by contractors in criminal, civil, or administrative proceedings relating to violations of Federal or State statutes or regulations, which resulted in dispositions against contractors based on such violations.

**EFFECTIVE DATE OF 1998 AMENDMENT**

Amendment by Pub. L. 105-261 applicable with respect to costs of compensation of senior executives incurred after Jan. 1, 1999, under covered contracts entered into before, on, or after Oct. 17, 1998, see section 804(d) of Pub. L. 105-261, set out as a note under section 2324 of Title 10, Armed Forces.

**EFFECTIVE DATE OF 1997 AMENDMENT**

Amendment by Pub. L. 105-85 effective on date that is 90 days after Nov. 18, 1997, and applicable with respect to costs of compensation incurred after Jan. 1, 1998, under covered contracts entered into before, on, or after Nov. 18, 1997, see section 808(e) of Pub. L. 105-85, set out as an Effective Date note under section 435 of this title.

**EFFECTIVE DATE OF 1994 AMENDMENT**

For effective date and applicability of amendment by Pub. L. 103-355, see section 10001 of Pub. L. 103-355, set out as a note under section 251 of this title.

**EFFECTIVE DATE**

Section effective with respect to contracts awarded after Nov. 19, 1988, see section 8(e) of Pub. L. 100-700, set out as an Effective and Termination Dates of 1988 Amendment note under section 2324 of Title 10, Armed Forces.

**REVISION OF COST PRINCIPLE RELATING TO ENTERTAINMENT, GIFT, AND RECREATION COSTS FOR CONTRACTOR EMPLOYEES**

Section 2192 of Pub. L. 103-355 provided that:

“(a) COSTS NOT ALLOWABLE.—(1) The costs of gifts or recreation for employees of a contractor or members of their families that are provided by the contractor to improve employee morale or performance or for any other purpose are not allowable under a covered contract unless, within 120 days after the date of the enactment of this Act [Oct. 13, 1994], the Federal Acquisition Regulatory Council prescribes amendments to the Federal Acquisition Regulation specifying circumstances under which such costs are allowable under a covered contract.

“(2) Not later than 90 days after the date of the enactment of this Act, the Federal Acquisition Regulatory Council shall amend the cost principle in the Federal Acquisition Regulation that is set out in section 31.205-14 of title 48, Code of Federal Regulations, relating to unallowability of entertainment costs—

“(A) by inserting in the cost principle a statement that costs made specifically unallowable under that cost principle are not allowable under any other cost principle; and

“(B) by striking out ‘(but see 31.205-1 and 31.205-13)’.

“(b) DEFINITIONS.—In this section:

“(1) The term ‘employee’ includes officers and directors of a contractor.

“(2) The term ‘covered contract’ has the meaning given such term in section 2324(l) of title 10, United States Code (as amended by section 2101(c)), and section 306(l) of the Federal Property and Administrative Services Act of 1949 (as added by section 2151) [41 U.S.C. 256(l)].

“(c) EFFECTIVE DATE.—Any amendments to the Federal Acquisition Regulation made pursuant to subsection (a) shall apply with respect to costs incurred

after the date on which the amendments made by section 2101 apply (as provided in section 10001) [set out as an Effective Date of 1994 Amendment note under section 251 of this title] or the date on which the amendments made by section 2151 apply (as provided in section 10001), whichever is later.”

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 435 of this title.

### § 256a. Waiver of liquidated damages

Whenever any contract made on behalf of the Government by the head of any Federal Agency, or by officers authorized by him so to do, includes a provision for liquidated damages for delay, the Secretary of the Treasury upon recommendation of such head is authorized and empowered to remit the whole or any part of such damages as in his discretion may be just and equitable.

(Sept. 5, 1950, ch. 849, §10(a), 64 Stat. 591; Pub. L. 104-316, title II, §202(u), Oct. 19, 1996, 110 Stat. 3845.)

#### CODIFICATION

Section was not enacted as part of title III of act June 30, 1949, ch. 288, 63 Stat. 393, which comprises this subchapter.

#### AMENDMENTS

1996—Pub. L. 104-316 substituted “Secretary of the Treasury” for “Comptroller General”.

### § 257. Administrative determinations

#### (a) Conclusiveness; delegation of powers

Determinations and decisions provided in this Act to be made by the Administrator or other agency head shall be final. Such determinations or decisions may be made with respect to individual purchases or contracts or, except for determinations or decisions under sections 253, 253a, and 253b of this title, with respect to classes of purchases or contracts. Except as provided in section 253(d)(2) of this title, and except as provided in section 486(d) of title 40 with respect to the Administrator, the agency head is authorized to delegate his powers provided by this Act, including the making of such determinations and decisions, in his discretion and subject to his direction, to any other officer or officers or officials of the agency.

#### (b) Basis of determinations; finding conclusive; preservation of findings; copy

Each determination or decision required by section 254 or by section 255(d) of this title shall be based upon written findings made by the official making such determination, which findings shall be final and shall be available within the agency for a period of at least six years following the date of the determination.

(June 30, 1949, ch. 288, title III, §307, 63 Stat. 396; Pub. L. 85-800, §5, Aug. 28, 1958, 72 Stat. 967; Pub. L. 89-343, §§3, 4, Nov. 8, 1965, 79 Stat. 1303; Pub. L. 98-369, div. B, title VII, §2714(a)(4), July 18, 1984, 98 Stat. 1184; Pub. L. 104-106, div. D, title XLIII, §4321(e)(6), Feb. 10, 1996, 110 Stat. 675; Pub. L. 104-316, title I, §121(c), Oct. 19, 1996, 110 Stat. 3836.)

#### REFERENCES IN TEXT

This Act, referred to in subsec. (a), is act June 30, 1949, ch. 288, 63 Stat. 377, as amended, known as the

Federal Property and Administrative Services Act of 1949. For complete classification of this Act to the Code, see Short Title note set out under section 471 of Title 40, Public Buildings, Property, and Works, and Tables.

#### AMENDMENTS

1996—Subsec. (b). Pub. L. 104-316 struck out at end “A copy of the findings shall be submitted to the General Accounting Office with the contract.”

Pub. L. 104-106 substituted “section 255(d)” for “section 255(c)”.

1984—Subsec. (a). Pub. L. 98-369, §2714(a)(4), substituted provision that determinations and decisions provided in this Act to be made by the Administrator or other agency head shall be final for provision that such determinations and decisions provided in this subchapter to be made by such official would be final, and inserted exception for determinations or decisions under sections 253, 253a, and 253b of this title, substituted “Except as provided in section 253(d)(2) of this title” for “Except as provided in subsection (b) of this section”, and directed the substitution of “this Act” for “this chapter” after “powers provided by”, which substitution was not capable of literal execution because the original text read “this title”. Consequently, the amendment was executed by substituting “this Act” for “this title” as the probable intent of Congress.

Subsecs. (b), (c). Pub. L. 98-369, §2714(a)(4)(D)-(F), redesignated subsec. (c) as (b), struck out “paragraphs (11), (12), (13), or of section 253(c)”, and struck out former subsec. (b) which related to nondelegable powers and powers delegable to certain persons.

Subsec. (d). Pub. L. 98-369, §2714(a)(4)(G), struck out subsec. (d) which related to preservation of data relating to contracts negotiated pursuant to the former provisions of section 252(c) of this title.

1965—Subsec. (a). Pub. L. 89-343, §3, inserted “and except as provided in section 486(d) of title 40 with respect to the Administrator”.

Subsec. (b). Pub. L. 89-343, §4, struck out provisions which made the power of Administrator to make the delegations and determinations specified in section 252(a) of this title delegable only to Deputy Administrator or to chief official of any principal organizational unit of General Services Administration.

1958—Subsec. (b). Pub. L. 85-800, §5(a), (b), substituted “(12)” for “(11)”, “(13)” for “(12)”, and “(11)” for “(10)” and struck out “and in section 255(a) of this title” before “shall not be delegable” in first sentence.

Subsec. (c). Pub. L. 85-800, §5(a), (c), substituted “(11), (12), (13), or (14)” for “(10), (11), (12), or (13)”, and “255(c)” for “255(a)”.

#### EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104-106, see section 4401 of Pub. L. 104-106, set out as a note under section 251 of this title.

#### EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-369 applicable with respect to any solicitation for bids or proposals issued after Mar. 31, 1985, see section 2751 of Pub. L. 98-369, set out as a note under section 251 of this title.

#### EFFECTIVE DATE

Section effective July 1, 1949, see section 605 of act June 30, 1949, set out as a note under section 471 of Title 40, Public Buildings, Property, and Works.

#### DEFINITIONS

The definitions in section 472 of Title 40, Public Buildings, Property, and Works, apply to this subchapter.

### § 258. Repealed. Pub. L. 103-355, title VII, § 7205, Oct. 13, 1994, 108 Stat. 3382

Section, acts June 30, 1949, ch. 288, title III, §308, 63 Stat. 397; July 18, 1984, Pub. L. 98-369, div. B, title VII,



§ 2714(a)(5), 98 Stat. 1185, related to application of certain laws to purchases or contracts.

## § 259. Definitions

As used in this subchapter—

(a) The term “agency head” shall mean the head or any assistant head of any executive agency, and may at the option of the Administrator include the chief official of any principal organizational unit of the General Services Administration.

(b) The term “competitive procedures” means procedures under which an executive agency enters into a contract pursuant to full and open competition. Such term also includes—

(1) procurement of architectural or engineering services conducted in accordance with title IX of this Act (40 U.S.C. 541 et seq.);

(2) the competitive selection of basic research proposals resulting from a general solicitation and the peer review or scientific review (as appropriate) of such proposals;

(3) the procedures established by the Administrator for the multiple awards schedule program of the General Services Administration if—

(A) participation in the program has been open to all responsible sources; and

(B) orders and contracts under such procedures result in the lowest overall cost alternative to meet the needs of the Government;

(4) procurements conducted in furtherance of section 644 of title 15 as long as all responsible business concerns that are entitled to submit offers for such procurements are permitted to compete; and

(5) a competitive selection of research proposals resulting from a general solicitation and peer review or scientific review (as appropriate) solicited pursuant to section 638 of title 15.

(c) The following terms have the meanings provided such terms in section 403 of this title:

- (1) The term “procurement”.
- (2) The term “procurement system”.
- (3) The term “standards”.
- (4) The term “full and open competition”.
- (5) The term “responsible source”.
- (6) The term “technical data”.
- (7) The term “major system”.
- (8) The term “item”.
- (9) The term “item of supply”.
- (10) The term “supplies”.
- (11) The term “commercial item”.
- (12) The term “nondevelopmental item”.
- (13) The term “commercial component”.
- (14) The term “component”.

(d)(1) The term “simplified acquisition threshold” has the meaning provided that term in section 403 of this title, except that, in the case of any contract to be awarded and performed, or purchase to be made, outside the United States in support of a contingency operation or a humanitarian or peacekeeping operation, the term means an amount equal to two times the amount specified for that term in section 403 of this title.

(2) In paragraph (1):

(A) The term “contingency operation” has the meaning given such term in section 101(a) of title 10.

(B) The term “humanitarian or peacekeeping operation” means a military operation in support of the provision of humanitarian or foreign disaster assistance or in support of a peacekeeping operation under chapter VI or VII of the Charter of the United Nations. The term does not include routine training, force rotation, or stationing.

(e) The term “Federal Acquisition Regulation” means the Federal Acquisition Regulation issued pursuant to section 421(c)(1) of this title.

(June 30, 1949, ch. 288, title III, § 309, 63 Stat. 397; July 12, 1952, ch. 703, § 1(h), 66 Stat. 593; Pub. L. 98-369, div. B, title VII, § 2711(a)(3), July 18, 1984, 98 Stat. 1180; Pub. L. 98-577, title V, § 504(a)(3), (4), Oct. 30, 1984, 98 Stat. 3086; Pub. L. 103-355, title I, § 1551, Oct. 13, 1994, 108 Stat. 3298; Pub. L. 104-201, div. A, title VIII, § 807(b), Sept. 23, 1996, 110 Stat. 2606; Pub. L. 105-85, div. A, title X, § 1073(g)(1), Nov. 18, 1997, 111 Stat. 1906.)

### REFERENCES IN TEXT

This Act, referred to in subsec. (b)(1), is the Federal Property and Administrative Services Act of 1949, approved June 30, 1949, ch. 288, 63 Stat. 377, as amended. Title IX of this Act is classified generally to subchapter VI (§ 541 et seq.) of chapter 10 of Title 40, Public Buildings, Property, and Works. For complete classification of this Act to the Code, see Short Title note set out under section 471 of Title 40 and Tables.

### AMENDMENTS

1997—Subsec. (b)(2). Pub. L. 105-85 struck out “and” at end.

1996—Subsec. (d). Pub. L. 104-201 designated existing provisions as par. (1), inserted “or a humanitarian or peacekeeping operation” after “contingency operation”, and added par. (2).

1994—Subsecs. (c) to (e). Pub. L. 103-355 added subsecs. (c) to (e) and struck out former subsec. (c) which read as follows: “The terms ‘full and open competition’, ‘responsible source’, ‘technical data’, ‘major system’, ‘item’, ‘item of supply’, and ‘supplies’ have the same meanings provided such terms in section 403 of this title.”

1984—Subsec. (b). Pub. L. 98-369 added subsec. (b).

Subsec. (b)(4), (5). Pub. L. 98-577, § 504(a)(3), added pars. (4) and (5).

Subsec. (c). Pub. L. 98-577, § 504(a)(4), substituted “, ‘responsible source’, ‘technical data’, ‘major system’, ‘item’, ‘item of supply’, and ‘supplies’ have” for “and ‘responsible source’ have” before “the meaning”.

Pub. L. 98-369 added subsec. (c).

1952—Subsec. (b). Act July 12, 1952, repealed subsec. (b) which defined “supplies”.

### EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103-355, see section 10001 of Pub. L. 103-355, set out as a note under section 251 of this title.

### EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-369 applicable with respect to any solicitation for bids or proposals issued after Mar. 31, 1985, see section 2751 of Pub. L. 98-369, set out as a note under section 251 of this title.

### EFFECTIVE DATE

Section effective July 1, 1949, see section 605 of act June 30, 1949, set out as a note under section 471 of Title 40, Public Buildings, Property, and Works.

### SMALL BUSINESS ACT

Amendment to this section by section 2711(a)(3) of Pub. L. 98-369 not to affect or supersede the provisions

of section 637(a) of Title 15, Commerce and Trade, see section 2711(c) of Pub. L. 98-369, set out as a note under section 253 of this title.

#### DEFINITIONS

The definitions in section 472 of Title 40, Public Buildings, Property, and Works, apply to this subchapter.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 20 section 1018a.

### § 260. Laws not applicable to contracts

Sections 5, 8, and 13 of this title shall not apply to the procurement of property or services made by an executive agency pursuant to this subchapter. Any provision of law which authorizes an executive agency (other than an executive agency which is exempted from the provisions of this subchapter by section 252(a) of this title), to procure any property or services without advertising or without regard to said section 5 of this title shall be construed to authorize the procurement of such property or services pursuant to the provisions of this subchapter relating to procedures other than sealed-bid procedures.

(June 30, 1949, ch. 288, title III, §310, 63 Stat. 397; July 12, 1952, ch. 703, §1(m), (n), 66 Stat. 594; Pub. L. 85-800, §6, Aug. 28, 1958, 72 Stat. 967; Pub. L. 89-343, §5, Nov. 8, 1965, 79 Stat. 1303; Pub. L. 98-369, div. B, title VII, §2714(a)(6), July 18, 1984, 98 Stat. 1185.)

#### AMENDMENTS

1984—Pub. L. 98-369 substituted “the provisions of this subchapter relating to procedures other than sealed-bid procedures” for “section 252(c)(15) of this title without regard to the advertising requirements of sections 252(c) and 253 of this title”.

1965—Pub. L. 89-343 substituted provisions making sections 5, 8, and 13 of this title inapplicable to the procurement of property or services made by an executive agency pursuant to this subchapter, and requiring any provision of law which authorizes an executive agency (other than an executive agency which is exempted from the provisions of this subchapter by section 252(a) of this title) to procure any property or services without advertising or without regard to said section 5 of this title to be construed to authorize the procurement of such property or services pursuant to section 252(c)(15) of this title without regard to the advertising requirements of section 252(c) and 253 of this title, for provisions which made sections 5, 6, 6a, and 13 of this title inapplicable to the procurement of property or services by the General Services Administration, or within the scope of authority delegated by the Administrator to any other executive agency, and which required reference in any Act to the applicability of section 5 of this title to the procurement of property or services by the General Services Administration or any constituent organization thereof or any other executive agency delegated authority pursuant to section 252(a)(2) of this title to be deemed a reference to section 252(c) of this title.

1958—Subsec. (b). Pub. L. 85-800 inserted “or any other executive agency delegated authority pursuant to section 252(a)(2) of this title”.

1952—Act July 12, 1952, designated existing provisions as subsec. (a), added subsec. (b), and substituting “property” for “supplies” in subsec. (a).

#### EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-369 applicable with respect to any solicitation for bids or proposals issued after Mar. 31, 1985, see section 2751 of Pub. L. 98-369, set out as a note under section 251 of this title.

#### EFFECTIVE DATE

Section effective July 1, 1949, see section 605 of act June 30, 1949, set out as a note under section 471 of Title 40, Public Buildings, Property, and Works.

### § 261. Assignment and delegation of procurement functions and responsibilities

#### (a) In general

Except to the extent expressly prohibited by another provision of law, the head of an executive agency may delegate to any other officer or official of that agency, any power under this subchapter.

#### (b) Procurements for or with other agencies

Subject to subsection (a) of this section, to facilitate the procurement of property and services covered by this subchapter by each executive agency for any other executive agency, and to facilitate joint procurement by those executive agencies—

(1) the head of an executive agency may delegate functions and assign responsibilities relating to procurement to any officer or employee within such agency;

(2) the heads of two or more executive agencies may by agreement delegate procurement functions and assign procurement responsibilities, consistent with section 1535 of title 31 and regulations issued under section 1074 of the Federal Acquisition Streamlining Act of 1994, from one executive agency to another of those executive agencies or to an officer or civilian employee of another of those executive agencies; and

(3) the heads of two or more executive agencies may establish joint or combined offices to exercise procurement functions and responsibilities.

(June 30, 1949, ch. 288, title III, §311, as added Pub. L. 103-355, title I, §1552, Oct. 13, 1994, 108 Stat. 3299.)

#### REFERENCES IN TEXT

Section 1074 of the Federal Acquisition Streamlining Act of 1994, referred to in subsec. (b)(2), is section 1074 of Pub. L. 103-355, which is set out as a note under section 1535 of Title 31, Money and Finance.

#### PRIOR PROVISIONS

A prior section 261, Pub. L. 101-509, title V, §532, Nov. 5, 1990, 104 Stat. 1470; Pub. L. 102-393, title V, §529, Oct. 6, 1992, 106 Stat. 1761, related to Internal Revenue Service procurement of expert services, prior to repeal by Pub. L. 103-355, §1055(c).

#### EFFECTIVE DATE

For effective date and applicability of section, see section 10001 of Pub. L. 103-355, set out as an Effective Date of 1994 Amendment note under section 251 of this title.

### § 262. Determinations and decisions

#### (a) Individual or class determinations and decisions authorized

Determinations and decisions required to be made under this subchapter by the head of an executive agency may be made for an individual purchase or contract or, except to the extent expressly prohibited by another provision of law, for a class of purchases or contracts. Such determinations and decisions are final.

**(b) Written findings required**

(1) Each determination under section 255(d) of this title or section 254d(c)(2)(B) of this title shall be based on a written finding by the person making the determination or decision. The finding shall set out facts and circumstances that support the determination or decision.

(2) Each finding referred to in paragraph (1) is final.

(3) The head of an executive agency shall maintain for a period of not less than 6 years a copy of each finding referred to in paragraph (1) that is made by a person in that executive agency. The period begins on the date of the determination or decision to which the finding relates.

(June 30, 1949, ch. 288, title III, §312, as added Pub. L. 103-355, title I, §1553, Oct. 13, 1994, 108 Stat. 3300.)

**EFFECTIVE DATE**

For effective date and applicability of section, see section 10001 of Pub. L. 103-355, set out as an Effective Date of 1994 Amendment note under section 251 of this title.

**§ 263. Performance based management: acquisition programs****(a) Congressional policy**

It is the policy of Congress that the head of each executive agency should achieve, on average, 90 percent of the cost, performance, and schedule goals established for major acquisition programs of the agency.

**(b) Establishment of goals**

(1) The head of each executive agency shall approve or define the cost, performance, and schedule goals for major acquisition programs of the agency.

(2) The chief financial officer of an executive agency shall evaluate the cost goals proposed for each major acquisition program of the agency.

**(c) Identification of noncompliant programs**

Whenever it is necessary to do so in order to implement the policy set out in subsection (a) of this section, the head of an executive agency shall—

(1) determine whether there is a continuing need for programs that are significantly behind schedule, over budget, or not in compliance with performance or capability requirements; and

(2) identify suitable actions to be taken, including termination, with respect to such programs.

(June 30, 1949, ch. 288, title III, §313, as added Pub. L. 103-355, title V, §5051(a), Oct. 13, 1994, 108 Stat. 3351; amended Pub. L. 105-85, div. A, title VIII, §851(a), Nov. 18, 1997, 111 Stat. 1851.)

**AMENDMENTS**

1997—Subsec. (a). Pub. L. 105-85 amended heading and text of subsec. (a) generally. Prior to amendment, text read as follows: “It is the policy of Congress that the head of each executive agency should achieve, on average, 90 percent of the cost and schedule goals established for major and nonmajor acquisition programs of the agency without reducing the performance or capabilities of the items being acquired.”

**ENHANCED SYSTEM OF PERFORMANCE INCENTIVES**

Section 5051(c) of Pub. L. 103-355 provided that: “Within one year after the date of the enactment of this Act [Oct. 13, 1994], the Deputy Director for Management of the Office of Management and Budget, in consultation with appropriate officials in other departments and agencies of the Federal Government, shall, to the maximum extent consistent with applicable law—

“(1) establish policies and procedures for the heads of such departments and agencies to designate acquisition positions and manage employees (including the accession, education, training and career development of employees) in the designated acquisition positions; and

“(2) review the incentives and personnel actions available to the heads of departments and agencies of the Federal Government for encouraging excellence in the acquisition workforce of the Federal Government and provide an enhanced system of incentives for the encouragement of excellence in such workforce which—

“(A) relates pay to performance (including the extent to which the performance of personnel in such workforce contributes to achieving the cost goals, schedule goals, and performance goals established for acquisition programs pursuant to section 313(b) of the Federal Property and Administrative Services Act of 1949, as added by subsection (a) [41 U.S.C. 263(b)]; and

“(B) provides for consideration, in personnel evaluations and promotion decisions, of the extent to which the performance of personnel in such workforce contributes to achieving such cost goals, schedule goals, and performance goals.”

**RECOMMENDED LEGISLATION**

Section 5051(d) of Pub. L. 103-355 provided that: “Not later than one year after the date of the enactment of this Act [Oct. 13, 1994], the Administrator for Federal Procurement Policy shall submit to Congress any recommended legislation that the Secretary considers necessary to carry out section 313 of the Federal Property and Administrative Services Act of 1949, as added by subsection (a) [41 U.S.C. 263], and otherwise to facilitate and enhance management of Federal Government acquisition programs and the acquisition workforce of the Federal Government on the basis of performance.”

**SECTION REFERRED TO IN OTHER SECTIONS**

This section is referred to in sections 405, 433 of this title.

**§ 264. Relationship of commercial item provisions to other provisions of law****(a) Applicability of subchapter**

Unless otherwise specifically provided, nothing in this section, section 264a of this title, or section 264b of this title shall be construed as providing that any other provision of this subchapter relating to procurement is inapplicable to the procurement of commercial items.

**(b) List of laws inapplicable to contracts for acquisition of commercial items**

No contract for the procurement of a commercial item entered into by the head of an executive agency shall be subject to any law properly listed in the Federal Acquisition Regulation (pursuant to section 430 of this title).

(June 30, 1949, ch. 288, title III, §314, as added Pub. L. 103-355, title VIII, §8201, Oct. 13, 1994, 108 Stat. 3394.)

**EFFECTIVE DATE**

For effective date and applicability of section, see section 10001 of Pub. L. 103-355, set out as an Effective

Date of 1994 Amendment note under section 251 of this title.

#### REGULATIONS

Section 8002 of Pub. L. 103-355 provided that:

“(a) IN GENERAL.—The Federal Acquisition Regulation shall provide regulations to implement paragraphs (12) through (15) of section 4 of the Office of Federal Procurement Policy Act [41 U.S.C. 403(12)–(15)], chapter 140 of title 10, United States Code, and sections 314 through 314B of the Federal Property and Administrative Services Act of 1949 [41 U.S.C. 264–264b].

“(b) CONTRACT CLAUSES.—(1) The regulations prescribed under subsection (a) shall contain a list of contract clauses to be included in contracts for the acquisition of commercial end items. Such list shall, to the maximum extent practicable, include only those contract clauses—

“(A) that are required to implement provisions of law or executive orders applicable to acquisitions of commercial items or commercial components, as the case may be; or

“(B) that are determined to be consistent with standard commercial practice.

“(2) Such regulations shall provide that a prime contractor shall not be required by the Federal Government to apply to any of its divisions, subsidiaries, affiliates, subcontractors, or suppliers that are furnishing commercial items any contract clause except those—

“(A) that are required to implement provisions of law or executive orders applicable to subcontractors furnishing commercial items or commercial components, as the case may be; or

“(B) that are determined to be consistent with standard commercial practice.

“(3) To the maximum extent practicable, only the contract clauses listed pursuant to paragraph (1) may be used in a contract, and only the contract clauses referred to in paragraph (2) may be required to be used in a subcontract, for the acquisition of commercial items or commercial components by or for an executive agency.

“(4) The Federal Acquisition Regulation shall provide standards and procedures for waiving the use of contract clauses required pursuant to paragraph (1), other than those required by law, including standards for determining the cases in which a waiver is appropriate.

“(5) For purposes of this subsection, the term ‘subcontract’ includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or subcontractor.

“(c) MARKET ACCEPTANCE.—(1) The Federal Acquisition Regulation shall provide that under appropriate conditions the head of an executive agency may require offerors to demonstrate that the items offered—

“(A) have either—

“(i) achieved commercial market acceptance; or

“(ii) been satisfactorily supplied to an executive agency under current or recent contracts for the same or similar requirements; and

“(B) otherwise meet the item description, specifications, or other criteria prescribed in the public notice and solicitation relating to the contract.

“(2) The Federal Acquisition Regulation shall provide guidance to ensure that the criteria for determining commercial market acceptance include the consideration of—

“(A) the minimum needs of the executive agency concerned; and

“(B) the entire relevant commercial market, including small businesses.

“(d) USE OF FIRM, FIXED PRICE CONTRACTS.—The Federal Acquisition Regulation shall include, for acquisitions of commercial items—

“(1) a requirement that firm, fixed price contracts or fixed price with economic price adjustment contracts be used to the maximum extent practicable; and

“(2) a prohibition on use of cost type contracts.

“(e) CONTRACT QUALITY REQUIREMENTS.—The regulations prescribed under subsection (a) shall include provisions that—

“(1) permit, to the maximum extent practicable, a contractor under a commercial items acquisition to use the existing quality assurance system of the contractor as a substitute for compliance with an otherwise applicable requirement for the Government to inspect or test the commercial items before the contractor’s tender of those items for acceptance by the Government;

“(2) require that, to the maximum extent practicable, the executive agency take advantage of warranties (including extended warranties) offered by offerors of commercial items and use such warranties for the repair and replacement of commercial items; and

“(3) set forth guidance regarding the use of past performance of commercial items and sources as a factor in contract award decisions.

“(f) DEFENSE CONTRACT CLAUSES.—(1) Section 824(b) of the National Defense Authorization Act for Fiscal Years 1990 and 1991 (Public Law 101-189; [former] 10 U.S.C. 2325 note) shall cease to be effective on the date on which the regulations implementing this section become effective [Oct. 1, 1995, see 60 F.R. 48231, Sept. 18, 1995].

“(2) Notwithstanding subsection (b), a contract of the Department of Defense entered into before the date on which section 824(b) ceases to be effective under paragraph (1), and a subcontract entered into before such date under such a contract, may include clauses developed pursuant to paragraphs (2) and (3) of section 824(b) of the National Defense Authorization Act for Fiscal Years 1990 and 1991 (Public Law 101-189; [former] 10 U.S.C. 2325 note).”

#### PROVISIONS NOT AFFECTED BY TITLE VIII OF PUB. L. 103-355

Section 8304 of title VIII of Pub. L. 103-355 provided that: “Nothing in this title [enacting this section, sections 264a, 264b, and 430 of this title, sections 2375 to 2377 of Title 10, Armed Forces, and section 334 of Title 40, Public Buildings, Property, and Works, amending sections 57, 58, 253g, 254, 403, 416, 418, 422, 423, and 701 of this title, sections 2306, 2320, 2321, 2384, 2393, 2397, 2397b, 2397c, 2402, 2408, and 2410b of Title 10, section 1368 of Title 33, Navigation and Navigable Waters, and section 40118 of Title 49, Transportation, repealing section 424 of this title and section 2325 of Title 10, enacting provisions set out as notes under this section, sections 264b and 430 of this title, and section 7606 of Title 42, The Public Health and Welfare, and amending provisions set out as notes under sections 2301 and 2327 of Title 10] shall be construed as modifying or superseding, or as intended to impair or restrict, authorities or responsibilities under—

“(1) section 2323 of title 10, United States Code, or section 7102 of the Federal Acquisition Streamlining Act of 1994 [Pub. L. 103-355, 15 U.S.C. 644 note];

“(2) the Brooks Automatic Data Processing Act (section 111 of the Federal Property and Administrative Services Act of 1949 [former] 40 U.S.C. 759);

“(3) Brooks Architect-Engineers Act (title IX of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 541 et seq.));

“(4) subsections (a) and (d) of section 8 of the Small Business Act (15 U.S.C. 637(a) and (d)); or

“(5) the Javits-Wagner-O’Day Act (41 U.S.C. 46–48c).”

#### § 264a. Definitions relating to procurement of commercial items

As used in this subchapter, the terms “commercial item”, “nondevelopmental item”, “component”, and “commercial component” have the meanings provided in section 403 of this title.

(June 30, 1949, ch. 288, title III, §314A, as added Pub. L. 103-355, title VIII, §8202, Oct. 13, 1994, 108 Stat. 3394; amended Pub. L. 104-106, div. D, title XLIII, §4321(e)(7), Feb. 10, 1996, 110 Stat. 675.)

#### AMENDMENTS

1996—Pub. L. 104-106 inserted “relating to procurement of commercial items” after “Definitions” in section catchline.

#### EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104-106, see section 4401 of Pub. L. 104-106, set out as a note under section 251 of this title.

#### EFFECTIVE DATE

For effective date and applicability of section, see section 10001 of Pub. L. 103-355, set out as an Effective Date of 1994 Amendment note under section 251 of this title.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 264 of this title.

### § 264b. Preference for acquisition of commercial items

#### (a) Preference

The head of each executive agency shall ensure that, to the maximum extent practicable—

- (1) requirements of the executive agency with respect to a procurement of supplies or services are stated in terms of—
  - (A) functions to be performed;
  - (B) performance required; or
  - (C) essential physical characteristics;

(2) such requirements are defined so that commercial items or, to the extent that commercial items suitable to meet the executive agency’s needs are not available, nondevelopmental items other than commercial items, may be procured to fulfill such requirements; and

(3) offerors of commercial items and nondevelopmental items other than commercial items are provided an opportunity to compete in any procurement to fill such requirements.

#### (b) Implementation

The head of each executive agency shall ensure that procurement officials in that executive agency, to the maximum extent practicable—

- (1) acquire commercial items or nondevelopmental items other than commercial items to meet the needs of the executive agency;
- (2) require prime contractors and subcontractors at all levels under the executive agency contracts to incorporate commercial items or nondevelopmental items other than commercial items as components of items supplied to the executive agency;
- (3) modify requirements in appropriate cases to ensure that the requirements can be met by commercial items or, to the extent that commercial items suitable to meet the executive agency’s needs are not available, nondevelopmental items other than commercial items;
- (4) state specifications in terms that enable and encourage bidders and offerors to supply commercial items or, to the extent that commercial items suitable to meet the executive

agency’s needs are not available, nondevelopmental items other than commercial items in response to the executive agency solicitations;

(5) revise the executive agency’s procurement policies, practices, and procedures not required by law to reduce any impediments in those policies, practices, and procedures to the acquisition of commercial items; and

(6) require training of appropriate personnel in the acquisition of commercial items.

#### (c) Preliminary market research

(1) The head of an executive agency shall conduct market research appropriate to the circumstances—

(A) before developing new specifications for a procurement by that executive agency; and

(B) before soliciting bids or proposals for a contract in excess of the simplified acquisition threshold.

(2) The head of an executive agency shall use the results of market research to determine whether there are commercial items or, to the extent that commercial items suitable to meet the executive agency’s needs are not available, nondevelopmental items other than commercial items available that—

(A) meet the executive agency’s requirements;

(B) could be modified to meet the executive agency’s requirements; or

(C) could meet the executive agency’s requirements if those requirements were modified to a reasonable extent.

(3) In conducting market research, the head of an executive agency should not require potential sources to submit more than the minimum information that is necessary to make the determinations required in paragraph (2).

(June 30, 1949, ch. 288, title III, §314B, as added Pub. L. 103-355, title VIII, §8203, Oct. 13, 1994, 108 Stat. 3394.)

#### EFFECTIVE DATE

For effective date and applicability of section, see section 10001 of Pub. L. 103-355, set out as an Effective Date of 1994 Amendment note under section 251 of this title.

#### COMPTROLLER GENERAL REVIEW OF FEDERAL GOVERNMENT USE OF MARKET RESEARCH

Section 8305 of Pub. L. 103-355 provided that:

“(a) REPORT REQUIRED.—Not later than 2 years after the date of the enactment of this Act [Oct. 13, 1994], the Comptroller General of the United States shall submit to the Congress a report on the use of market research by the Federal Government in support of the procurement of commercial items and nondevelopmental items.

“(b) CONTENT OF REPORT.—The report shall include the following:

“(1) A review of existing Federal Government market research efforts to gather data concerning commercial and other nondevelopmental items.

“(2) A review of the feasibility of creating a Government-wide data base for storing, retrieving, and analyzing market data, including use of existing Federal Government resources.

“(3) Any recommendations for changes in law or regulations that the Comptroller General considers appropriate.”

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 264 of this title; title 15 section 205f.

**§ 265. Contractor employees: protection from reprisal for disclosure of certain information**

**(a) Prohibition of reprisals**

An employee of a contractor may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a Member of Congress or an authorized official of an executive agency or the Department of Justice information relating to a substantial violation of law related to a contract (including the competition for or negotiation of a contract).

**(b) Investigation of complaints**

A person who believes that the person has been subjected to a reprisal prohibited by subsection (a) of this section may submit a complaint to the Inspector General of the executive agency. Unless the Inspector General determines that the complaint is frivolous, the Inspector General shall investigate the complaint and, upon completion of such investigation, submit a report of the findings of the investigation to the person, the contractor concerned, and the head of the agency. In the case of an executive agency that does not have an Inspector General, the duties of the Inspector General under this section shall be performed by an official designated by the head of the executive agency.

**(c) Remedy and enforcement authority**

(1) If the head of an executive agency determines that a contractor has subjected a person to a reprisal prohibited by subsection (a) of this section, the head of the executive agency may take one or more of the following actions:

(A) Order the contractor to take affirmative action to abate the reprisal.

(B) Order the contractor to reinstate the person to the position that the person held before the reprisal, together with the compensation (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

(C) Order the contractor to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the executive agency.

(2) Whenever a person fails to comply with an order issued under paragraph (1), the head of the executive agency shall file an action for enforcement of such order in the United States district court for a district in which the reprisal was found to have occurred. In any action brought under this paragraph, the court may grant appropriate relief, including injunctive relief and compensatory and exemplary damages.

(3) Any person adversely affected or aggrieved by an order issued under paragraph (1) may obtain review of the order's conformance with this subsection, and any regulations issued to carry out this section, in the United States court of appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60

days after issuance of the order by the head of the agency. Review shall conform to chapter 7 of title 5.

**(d) Construction**

Nothing in this section may be construed to authorize the discharge of, demotion of, or discrimination against an employee for a disclosure other than a disclosure protected by subsection (a) of this section or to modify or derogate from a right or remedy otherwise available to the employee.

**(e) Definitions**

In this section:

(1) The term "contract" means a contract awarded by the head of an executive agency.

(2) The term "contractor" means a person awarded a contract with an executive agency.

(3) The term "Inspector General" means an Inspector General appointed under the Inspector General Act of 1978.

(June 30, 1949, ch. 288, title III, §315, as added Pub. L. 103-355, title VI, §6006, Oct. 13, 1994, 108 Stat. 3365; amended Pub. L. 104-106, div. D, title XLIII, §4321(e)(8), Feb. 10, 1996, 110 Stat. 675.)

REFERENCES IN TEXT

The Inspector General Act of 1978, referred to in subsec. (e)(3), is Pub. L. 95-452, Oct. 12, 1978, 92 Stat. 1101, as amended, which is set out in the Appendix to Title 5, Government Organization and Employees.

AMENDMENTS

1996—Subsec. (b). Pub. L. 104-106 substituted "Inspector General" for "inspector general" after "does not have an" and after "the duties of the".

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104-106, see section 4401 of Pub. L. 104-106, set out as a note under section 251 of this title.

EFFECTIVE DATE

For effective date and applicability of section, see section 10001 of Pub. L. 103-355, set out as an Effective Date of 1994 Amendment note under section 251 of this title.

**§ 266. Merit-based award of grants for research and development**

**(a) Policy**

It is the policy of Congress that an executive agency should not be required by legislation to award a new grant for research, development, test, or evaluation to a non-Federal Government entity. It is further the policy of Congress that any program, project, or technology identified in legislation be awarded through merit-based selection procedures.

**(b) Rule of construction**

A provision of law may not be construed as requiring a new grant to be awarded to a specified non-Federal Government entity unless that provision of law—

(1) specifically refers to this subsection;

(2) specifically identifies the particular non-Federal Government entity involved; and

(3) specifically states that the award to that entity is required by such provision of law in contravention of the policy set forth in subsection (a) of this section.

**(c) New grant defined**

For purposes of this section, a grant is a new grant unless the work provided for in the grant is a continuation of the work performed by the specified entity under a preceding grant.

**(d) Inapplicability to certain grants**

This section shall not apply with respect to any grant that calls upon the National Academy of Sciences to investigate, examine, or experiment upon any subject of science or art of significance to an executive agency and to report on such matters to Congress or any agency of the Federal Government.

(June 30, 1949, ch. 288, title III, §316, as added Pub. L. 103-355, title VII, §7203(b)(2), Oct. 13, 1994, 108 Stat. 3381; amended Pub. L. 104-106, div. D, title XLIII, §4321(e)(9), Feb. 10, 1996, 110 Stat. 675.)

## AMENDMENTS

1996—Pub. L. 104-106 made technical amendment to section catchline in original.

## EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104-106, see section 4401 of Pub. L. 104-106, set out as a note under section 251 of this title.

## EFFECTIVE DATE

For effective date and applicability of section, see section 10001 of Pub. L. 103-355, set out as an Effective Date of 1994 Amendment note under section 251 of this title.

SUBCHAPTER V—FOREIGN EXCESS  
PROPERTY**§§ 271 to 274. Transferred**

## CODIFICATION

Section 271, act June 30, 1949, ch. 288, title IV, §401, 63 Stat. 397, which related to disposal of foreign excess property, was transferred to section 511 of Title 40, Public Buildings, Property, and Works.

Section 272, act June 30, 1949, ch. 288, title IV, §402, 63 Stat. 398, which related to methods and terms of disposal, was transferred to section 512 of Title 40.

Section 273, act June 30, 1949, ch. 288, title IV, §403, 63 Stat. 398, which related to proceeds from disposals, was transferred to section 513 of Title 40.

Section 274, act June 30, 1949, ch. 288, title IV, §404, 63 Stat. 398, which related to general provisions, was transferred to section 514 of Title 40.

SUBCHAPTER VI—FEDERAL RECORD  
MANAGEMENT**§§ 281 to 291. Transferred**

## CODIFICATION

Section 281, acts June 30, 1949, ch. 288, title V, §502; Sept. 5, 1950, ch. 849, §6(d), 64 Stat. 583, which related to custody and control of property, was transferred to section 392 of former Title 44, Public Printing and Documents.

Section 282, acts June 30, 1949, ch. 288, title V, §503; Sept. 5, 1950, ch. 849, §6(d), 64 Stat. 583, which related to National Historical Publications Commission, was transferred to section 393 of former Title 44.

Section 283, acts June 30, 1949, ch. 288, title V, §504; Sept. 5, 1950, ch. 849, §6(d), 64 Stat. 583, which related to establishment of Federal Records Council, was transferred to section 394 of former Title 44.

Section 284, acts June 30, 1949, ch. 288, title V, §505; Sept. 5, 1950, ch. 849, §6(d), 64 Stat. 583, which related to

records management by Administrator, was transferred to section 395 of former Title 44.

Section 285, acts June 30, 1949, ch. 288, title V, §506; Sept. 5, 1950, ch. 849, §6(d), 64 Stat. 583, which related to records management by agency heads, was transferred to section 396 of former Title 44.

Section 286, acts June 30, 1949, ch. 288, title V, §507; Sept. 5, 1950, ch. 849, §6(d), 64 Stat. 583, which related to Archival administration, was transferred to section 397 of former Title 44.

Section 287, acts June 30, 1949, ch. 288, title V, §508; Sept. 5, 1950, ch. 849, §6(d), 64 Stat. 583, which related to reports, was transferred to section 398 of former Title 44.

Section 288, acts June 30, 1949, ch. 288, title V, §509; Sept. 5, 1950, ch. 849, §6(d), 64 Stat. 583, which related to legal status of reproductions; official seal; fees for copies and reproductions, was transferred to section 399 of former Title 44.

Section 289, acts June 30, 1949, ch. 288, title V, §510; Sept. 5, 1950, ch. 849, §6(d), 64 Stat. 583, which related to limitation on liability, was transferred to section 400 of former Title 44.

Section 290, acts June 30, 1949, ch. 288, title V, §511; Sept. 5, 1950, ch. 849, §6(d), 64 Stat. 583, which related to definitions, was transferred to section 401 of former Title 44.

Section 291, act Aug. 2, 1946, ch. 753, title I, §140, 60 Stat. 833, which related to transfer of records of Congress, was transferred to section 402 of former Title 44.

Sections 392 to 402 of former Title 44 are covered by chapter 21 (§2101 et seq.), chapter 25 (§2501 et seq.), chapter 27 (§2701 et seq.), chapter 29 (§2901 et seq.), and chapter 31 (§3101 et seq.) of Title 44, Public Printing and Documents.

CHAPTER 5—JUDICIAL REVIEW OF  
ADMINISTRATIVE DECISIONS

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|------|---|
| Sec. |   |
| 321. | Limitation on pleading contract provisions relating to finality; standards of review. |
| 322. | Contract provisions making decisions final on questions of law.                       |

**§ 321. Limitation on pleading contract provisions relating to finality; standards of review**

No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however*, That any such decision shall be final and conclusive unless the same is fraudulent<sup>1</sup> or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

(May 11, 1954, ch. 199, §1, 68 Stat. 81.)

## AGENCY ACTIONS GENERALLY, JUDICIAL REVIEW

Judicial review of agency actions generally, see section 701 et seq. of Title 5, Government Organization and Employees.

**§ 322. Contract provisions making decisions final on questions of law**

No Government contract shall contain a provision making final on a question of law the deci-

<sup>1</sup> So in original. Probably should be "fraudulent".